RECORD AND BRIEFS

16-1094

No. 16-___

FILED
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 9, 2017

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QUESTION PRESENTED

Whether the Second Circuit erred by holding — in direct conflict with the D.C., Fifth, and Seventh Circuits and in the face of an amicus brief from the United States — that plaintiffs suing a foreign state under the Foreign Sovereign Immunities Act may serve the foreign state under 28 U.S.C § 1608(a)(3) by mail addressed and dispatched to the head of the foreign state's ministry of foreign affairs "via" or in "care of" the foreign state's diplomatic mission in the United States, despite U.S. obligations under the Vienna Convention on Diplomatic Relations to preserve mission inviolability.

PARTIES TO THE PROCEEDING

The Republic of the Sudan, petitioner on review, was the defendant-appellant below.

The following individuals, respondents on review, were the plaintiffs-appellees below: Rick Harrison, John Buckley III, Margaret Lopez, Andy Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Martin Songer Jr., Shelly Songer, Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams, Carl Wingate, and Tracey Smith as personal representative of the Estate of Rubin Smith.

Mashreqbank, BNP Paribas, National Bank of Egypt, and Crédit Agricole Corporate and Investment Bank, respondents on review, were respondents below.

The following entities, respondents on review, were defendants below. Pursuant to Rule 12.6 of this Court, Sudan does not believe that these entities have an interest in the outcome of this Petition: Advanced Chemical Works, AKA Advanced Commercial and Chemical Works Company Limited, AKA Advanced Training and Chemical Works Company Limited; Accounts & Electronics Equipments, AKA Accounts and Electronics Equipments; Agricultural Bank of Sudan; Alaktan Cotton Trading Company, AKA Alaktan Trading Company; Advanced Commercial and Chemical Works Company Limited, AKA Advanced Chemical Works, AKA Advanced Trading and Chemical Works Company Limited; Advanced Mining Works Company Limited; Advanced Petroleum Company, AKA APCO; African Oil Corporation; Advanced Engineering

Works; Advanced Trading and Chemical Works Company Limited, AKA Advanced Commercial and Chemical Works Company Limited, AKA Advanced Chemical Works; Al Sunut Development Company, AKA Alsunut Development Company; African Drilling Company; Al Pharakim, AKA Alfarachem Company Limited, AKA Alfarachem Pharmaceuticals Industries Limited, AKA Alfarakim; Alaktan Trading Company, AKA Alaktan Cotton Trading Company; Alfarachem Company Limited, AKA Al Pharakim, AKA Alfarachem Pharmaceuticals Industries Limited, AKA Alfarakim; Alfarakim, AKA Al Pharakim, AKA Alfarachem Pharmaceuticals Industries Limited, AKA Alfarachem Company Limited; Alfarachem Pharmaceuticals Industries Limited, AKA Al Pharakim, AKA Alfarakim, AKA Alfarachem Company Limited; Alsunut Development Company, AKA Al Sunut Development Company; APCO, AKA Advanced Petroleum Company; Amin El Gezai Company, AKA El Amin El Gezai Company; Arab Cement Company; Arab Sudanese Blue Nile Agricultural Company; Assalaya Sugar Company Limited; Arab Sudanese Seed Company; Arab Sudanese Vegetable Oil Company; Atbara Cement Company Limited; Automobile Corporation; Babanousa Milk Products Factory; Bank of Khartoum; Bashaier; Blue Nile Brewery; Blue Nile Packing Corporation; Central Electricity and Water Corporation, AKA Public Electricity and Water Corporation; Building Materials and refractories Corporation; Coptrade Company Limited, Pharmaceutical and Chemical Division; Central Bureau of Statistics of the Republic of Sudan; El Amin El Gezai Company, AKA Amin El Gezai Company; Coptrade Eng and Automobile Services Co

Ltd., AKA Kordofan Automobile Company; Duty Free Shops Corporation; El Nilein Bank, El Nilein Industrial Development Bank (Sudan), AKA El Nilein Industrial Development Bank Group, AKA Nilein Industrial Development Bank (Sudan); El Gezira Automobile Company; El Nilein Industrial Development Bank Group, AKA Industrial Bank of Sudan; Engineering Equipment Company; El Nilein Industrial Development Bank (Sudan), AKA El Nilein Bank, AKA El Nilein Industrial Development Bank Group, AKA Nilein Industrial Development Bank (Sudan); El Nilein Industrial Development Bank Group, AKA El Nilein Bank, AKA Nilein Industrial Development Bank (Sudan), AKA El Nilein Industrial Development Bank (Sudan); El Taka Automobile Company, AKA Taka Automobile Company; Emirates and Sudan Investments Company Limited; Engineering Equipment Corporation; Exploration and production Authority, (Sudan); Farmers Bank for Investment & Rural Development, AKA Farmers Bank for Investment and Rural Development, AKA Farmers Commercial Bank, Sudan Commercial Bank; Sudan Commercial Bank; Farmers Bank for Investment and Rural Development, AKA Farmers Commercial Bank; Farmers Bank for Investment & Rural Development; Farmers Commercial Bank, AKA Farmers Bank for Investment and Rural Development, AKA Sudan Commercial Bank, AKA Farmers Bank for Investment & Rural Development; Friendship Spinning Factory; Food Industries Corporation; Forests National Corporation; Gezira Tannery; Gezira Automobile Company, AKA El Gezira Automobile Company; Gezira Scheme, AKA Sudan Gezira Board; Gezira Trade and Services Company

Limited, AKA Gezira Trade & Services Company Limited; Gezira Trade & Services Company Limited, AKA Gezira Trade and Services Company Limited; Giad Automotive Company, AKA Giad Automotive Industry Company Limited, AKA Giad Cars & Heavy Trucks Company, Giad Cars and Heavy Trucks Company, Giad Automotive and Truck, AKA Giad Auto, AKA Giad Automotive; Giad Automotive and Truck, AKA Giad Automotive Company, AKA Giad Automotive Industry Company Limited, AKA Giad Cars & Heavy Trucks Company, AKA Giad Cars and Heavy Trucks Company; Giad Automotive Industry Company Limited, AKA Giad Automotive Company, AKA Giad Cars & Heavy Trucks Company, AKA Giad Cars and Heavy Trucks Company, AKA Giad Automotive and Truck; Giad Cars & Heavy Trucks Company, AKA Giad Automotive Company, AKA Giad Automotive Industry Company Limited, AKA Giad Cars and Heavy Trucks Company, AKA Giad Automotive and Truck, AKA Giad Automotive Company, AKA Giad Automotive Industry Company Limited, AKA Giad Cars and Heavy Trucks Company, AKA Giad Automotive and Truck; Giad Industrial Group, AKA Sudan Master Tech, AKA Sudan Master Technology, AKA Giad Industrial City; Gineid Sugar Factory; Giad Cars and Heavy Trucks Company, AKA Giad Automotive Company, AKA Giad Automotive Industry Company Limited, AKA Giad Cars & Heavy Trucks Company, AKA Giad Automotive and Truck; Giad Motor Industry Company Limited; Giad Industrial City, AKA Giad Industrial Group, AKA Sudan Master Tech, AKA Sudan Master Technology; Giad Motor Company, AKA Giad Motor Industry Company Limited; Greater Nile Petroleum Operating Company Limited, AKA

GNPOC; GNPOC, AKA Greater Nile Petroleum Operating Company Limited; Grouped Industries Corporation; Haggar Assalaya Sugar Factory; Hi Tech Group, AKA High Tech Group, AKA HighTech Group, AKA HiTech Group; HiConsult, AKA Hi-Consult; Gum Arabic Co. Ltd., AKA Gum Arabic Company, AKA GAC; Hicom, AKA Hi-Com; Guneid Sugar Company Limited, AKA Guneid Sugar Factory; Hi-Consult, AKA HiConsult; High Tech Group, AKA Hi Tech Group, AKA HighTech Group, AKA HiTech Group; HighTech Group, AKA Hi Tech Group, AKA High Tech Group, AKA HiTech Group; Hi-Tech Chemicals; ICDB, AKA Islamic Co-Operative Development Bank; HiTech Group, AKA Hi Tech Group, AKA High Tech Group, AKA HighTech Group; Hi-Tech Petroleum Group; Industrial Bank Company for Trade & Development Limited, AKA Industrial Bank Company for Trade & Development Limited; Industrial Bank Company for Trade & Development Limited, AKA Industrial Bank Company for Trade & Development Limited; Industrial Production Corporation; Ingassana Mines Hills Corporation, AKA Ingessana Hills Mines Corporation; Industrial Bank of Sudan, AKA El Nilein Industrial Development Bank Group; Industrial Research and Consultancy Institute; Juba Duty Free Shop; Ingessana Hills Mines Corporation, AKA Ingassana Mines Hills Corporation; Islamic Co-Operative Development Bank, AKA ICDB; Karima Date Factory; Karima Fruit and Vegetable Canning Factory; Kassala Fruit Processing Company; Kassala Onion Dehydration Factory; Kenaf Socks Factory; Kenana Sugar Company Ltd.; Kenana Friesland Dairy; Kenana Engineering and Technical Services; Kenana Integrated Agricultural Solutions; Khartoum

Gum Arabic Processing Company; Khartoum Central Foundry; Khartoum Tannery; Khartoum Commercial and Shipping Company Limited; Khartoum Refinery Company Ltd.; Khor Omer Engineering Company; Krikah Industries Group; Kordofan Automobile Company, AKA Coptrade Eng and Automobile Services Co Ltd.; Kordofan Company; Leather Industries Corporation, AKA Leather Industries Tanneries; Mangala Sugar Factory; Leather Industries Tanneries, AKA Leather Industries Corporation; Malut Sugar Factory; Military Commercial Corporation; Maspio Cement Corporation; May Engineering Company; Ministry of Agriculture and Irrigation of the Republic of Sudan; Ministry of Animal and Fishery Resources and Pastures of the Republic of Sudan; Ministry of Commerce of the Republic of Sudan; Ministry of Environment, Forests and Physical Development of the Republic of Sudan; Ministry of Culture and Information of the Republic of Sudan; Ministry of Electricity & Water Resources of the Republic of Sudan; Ministry of Energy and Mining of the Republic of Sudan; Ministry of Federal Governance of the Republic of Sudan; Ministry of Finance and National Economy of the Republic of Sudan; Ministry of Foreign Affairs of the Republic of Sudan; Ministry of Foreign Trade of the Republic of Sudan; Ministry of Guidance and Endowments of the Republic of Sudan; Ministry of Health of the Republic of Sudan; Ministry of Higher Education and Scientific Research of the Republic of Sudan; Ministry of Human Resources Development & Labor of the Republic of Sudan; Ministry of Humanitarian Affairs of the Republic of Sudan; Ministry of Information and Communications of the Republic of Sudan; Ministry

of Industry of the Republic of Sudan; Ministry of Interior of the Republic of Sudan; Ministry of Investment of the Republic of Sudan; Ministry of Justice of the Republic of Sudan; Ministry of Minerals of the Republic of Sudan; Ministry of Oil of the Republic of Sudan; Ministry of Social Welfare, Woman and Child Affairs of the Republic of Sudan; Ministry of Parliamentary Affairs of the Republic of Sudan; Ministry of Public Education of the Republic of Sudan; Ministry of Science and Technology of the Republic of Sudan; Ministry of Youth and Sport of the Republic of Sudan; Ministry of Tourism, Antiquities and Wildlife of the Republic of Sudan; Ministry of Transport, Roads and Bridges of the Republic of Sudan; Ministry of Welfare and Social Security of the Republic of Sudan; Modern Electronic Company; Modern Laundry Blue Factory, AKA The Modern Laundry Blue Factory; National Cigarettes Co. Limited; Modern Plastic & Ceramics Industries Company, AKA Modern Plastic and Ceramics Industries Company; Modern Plastic and Ceramics Industries Company, AKA Modern Plastic & Ceramics Industries Company; National Cotton and Trade Company; National Electricity Corporation, AKA Sudan National Electricity Corporation, AKA National Electricity Corporation (Sudan); National Reinsurance Company (Sudan) Limited; New Haifa Sugar Factory; New Khartoum Tannery; New Halfa Sugar Company, AKA New Halfa Sugar Factory Company Limited; Nile Cement Factory; New Halfa Sugar Factory Company Limited, AKA New Halfa Sugar Company; Nile Cement Company Limited; Omdurman Shoe Factory; Nilein Industrial Development Bank, (Sudan), AKA El Nilein Bank, AKA El Nilein Industrial Development Bank,

(Sudan), AKA El Nilein Industrial Development Bank Group; Plastic Sacks Factory, AKA Sacks Factory; Northwest Sennar Sugar Factory; Port Sudan Edible Oils Storage Corporation; Oil Corporation; Port Sudan Cotton and Trade Company, AKA Port Sudan Cotton Company; PetroHelp Petroleum Company Limited; Port Sudan Duty Free Shop; Petroleum General Administration; Posts and Telegraphs Public Corporation, AKA Posts & Telegraphs Corp.; Port Sudan Cotton Company, AKA Port Sudan Cotton and Trade Company; Rabak Oil Mill; Port Sudan Refinery Limited; Public Corporation for Irrigation and Excavation; Port Sudan Spinning Factory; Public Corporation for Building and Construction; Rainbow Factories; Public Corporation for Oil Products and Pipelines; Public Electricity and Water Corporation, Central Electricity and Water Corporation; Rea Sweet Factory; Ram Energy Company Limited; Red Sea Hills Minerals Company; Red Sea Stevedoring; Sacks Factory, AKA Plastic Sacks Factory; Refrigeration and Engineering Import Company; SFZ, AKA Sudanese Free Zones and Markets Company; Roads and Bridges Public Corporation; Sennar Sugar Company Limited; Sheikan Insurance and Reinsurance Company Limited, AKA Sheikan Insurance Company; Sheriek Mica Project, AKA Shereik Mica Mines Company; Sheikan Insurance Company, AKA Sheikan Insurance and Reinsurance Company Limited; Shereik Mica Mines Company, AKA Sheriek Mica Project; SRC, AKA Sudan Railways Corporation; Silos and Storage Corporation; SRDC, AKA Sudan Rural Development Company Limited; Spinning and Weaving Corporation; State Trading Company, AKA State Trading Corporation;

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Petitioner the Republic of the Sudan, a foreign state within the meaning of 28 U.S.C. § 1603, respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Second Circuit (App. 1a-21a) is reported at 802 F.3d 399. The Second Circuit's denial of panel rehearing (App. 92a-113a) is reported at 838 F.3d 86. The Second Circuit's denial of rehearing en banc is unreported but reproduced at App. 114a-115a.

The turnover orders entered by the U.S. District Court for the Southern District of New York are unreported but reproduced at App. 76a-91a.

The default judgment entered against Sudan by the U.S. District Court for the District of Columbia (App. 22a-75a) is reported at 882 F. Supp. 2d 23.

JURISDICTION

The Second Circuit entered judgment on September 23, 2015. Sudan's timely petition for panel rehearing was denied on September 22, 2016. Sudan's timely petition for rehearing en banc was denied on December 9, 2016.

This Court has jurisdiction to review the Second Circuit's decision under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The relevant provisions of the United States Code and the Vienna Convention on Diplomatic Relations are set forth in Appendix G.

STATEMENT

Numerous cases are filed against foreign states in U.S. courts each year. To initiate these cases, private plaintiffs must serve process on the foreign state pursuant to the prescribed methods of the Foreign Sovereign Immunities Act (FSIA). If the parties do not have an agreement for service of process and the foreign state is not a party to an applicable treaty on service, plaintiffs must serve the state by sending specified documents by any form of mail "addressed and dispatched . . . to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3).

The interpretation of § 1608(a)(3) accepted by the D.C., Fifth, and Seventh Circuits — and urged repeatedly by the United States, including in this case — is that process must be sent by mail to the head of the ministry of foreign affairs *directly*, and may not be served on or transmitted through the foreign state's embassy in the United States or through some other intermediary. *See Barot v. Embassy of the Republic of Zambia*, 785 F.3d 26, 29-30 (D.C. Cir. 2015); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1150 (1995); *Magness v. Russian Fed'n*, 247 F.3d 609, 611-13 (5th Cir. 2001), *cert. denied*, 534 U.S. 892 (2001); *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983); *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 748-49 (7th Cir. 2007), *cert. denied*, 552 U.S. 1231 (2008). In the Panel Opinion below, however, the Second Circuit departed from that sound interpretation and held that service is

effective under § 1608(a)(3) if the package is addressed and sent to the head of the ministry "via" or in "care of" the foreign state's embassy in the United States.

The consequences of this departure are substantial. First, the circuits are now split on an issue that is likely to arise in potentially dozens of cases each year. Furthermore, the Second Circuit's misreading of the FSIA contravenes Article 22 of the Vienna Convention on Diplomatic Relations, thus placing the United States in violation of its treaty obligations and threatening U.S. interests abroad. The United States informed the Second Circuit that allowing service via a foreign state's embassy was contrary to the Vienna Convention, but the Second Circuit rejected that view. *Cf. Abbott v. Abbott*, 560 U.S. 1, 15 (2010) (stating it is "well settled" that the Executive's treaty interpretation is "entitled to great weight"); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) (noting that U.S. courts must defer to the interpretation of the United States on its treaty obligations "absent extraordinarily strong evidence").

Article 22 of the Vienna Convention provides that "the premises of the mission shall be inviolable." Vienna Convention on Diplomatic Relations art. 22, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. Under U.S. and international law, this Article prohibits service of process on a sovereign's embassy, consulate, and diplomatic officers. *See, e.g., Autotech Techs.*, 499 F.3d at 748-49 (holding "service through an embassy is expressly banned both by an international treaty to which the United States is a

party and by U.S. statutory law"); James Crawford, *Brownlie's Principles of Public International Law* 403 (8th ed. 2012) ("It follows from Article 22 that writs cannot be served, even by post, within the premises of a mission but only through the local Ministry for Foreign Affairs.").

The United States has repeatedly stated that an Article 22 violation occurs regardless of whether service is "on" or "through" the diplomatic mission. *See, e.g.*, Brief for United States as Amicus Curiae at 5, *Harrison v. Republic of Sudan*, No. 14-121 (2d Cir. Nov. 6, 2015), ECF No. 101 (hereinafter "U.S. Br., *Harrison*") (App. 143a-144a); Brief for United States as Amicus Curiae at 17-18, *Kumar v. Republic of Sudan*, No. 16-2267 (4th Cir. Feb. 7, 2017) (App. 168a-169a). In either case, the plaintiffs are effectively requiring the mission to act as the foreign state's agent for service of process.

If the Second Circuit's decision stands, in contrast to the decisions of the D.C., Fifth, and Seventh Circuits, numerous plaintiffs undoubtedly will elect to serve foreign state defendants at their U.S. embassies and consulates in violation of the Vienna Convention — as they did in the case below and more recently in other cases. *See, e.g.*, Letter at 2, *Park v. Embassy of Indonesia*, No. 1:16-cv-6652 (E.D.N.Y. Feb. 13, 2017), ECF No. 7 (mailing service documents to Indonesia's embassy in Washington, D.C.); Proof of Service Ex. A at 1, *Hmong I v. Lao People's Democratic Republic*, No. 2:15-cv-2349 (E.D. Cal. Dec. 28, 2015), ECF No. 9 (delivering service documents to Laos through its embassy and ambassador in Washington, D.C.); *see also* Order at 2, *Pereira v.*

Consulate Gen. of Brazil in N.Y., No. 1:15-cv-2593 (S.D.N.Y. Dec. 29, 2015), ECF No. 15 (citing Panel Opinion and ordering plaintiff to move the clerk for service upon Brazilian consulate in New York). Moreover, plaintiffs likely will forum shop to take advantage of the easier service procedure adopted by the Second Circuit, thus avoiding the D.C. Circuit despite Congress' prescription of the District of Columbia as the default venue for suits against foreign states. *See* 28 U.S.C. § 1391(f).

Mailing documents to an embassy or consulate in the United States is objectively simpler for U.S. litigation plaintiffs than mailing to an often unfamiliar address in a foreign country. And such a domestic mailing is also plainly easier, faster, and less expensive than deploying the State Department's services through diplomatic channels under § 1608(a)(4). But convenience is not cause to ignore Congress' plain intent that § 1608(a)(3) be interpreted consistent with U.S. treaty obligations in respect of foreign sovereignty.

Significantly, as the United States has explained, the Second Circuit's holding threatens U.S. interests abroad by exposing the United States to reciprocal treatment in foreign courts. Presently, the United States "routinely objects to attempts by foreign courts and litigants to serve the U.S. government by direct delivery to an American embassy." U.S. Br., *Harrison*, at 1 (App. 140a). If the Second Circuit's ruling stands, the United States will face difficulty trying to argue in similar situations throughout the world that it has not been served properly.

In enacting the service provisions of the FSIA, Congress was aware of the potential conflict with the Vienna Convention, and it purposely removed from earlier drafts language authorizing service on an embassy or consulate. The Second Circuit, however, misread the text, context, and legislative history of § 1608(a), thereby allowing an erroneous and substantial default judgment of over $300 million to stand against a foreign state.

This Court should review this case now, not only to resolve the circuit split, but also because this case raises more than mere technical service-of-process issues. It implicates congressional intent in a delicate area of foreign relations, serious questions of foreign sovereignty, binding U.S. treaty obligations, and important U.S. interests abroad.

A. Statutory Framework

Under the FSIA, foreign states are presumed to be immune from subject-matter jurisdiction, subject to a number of specified exceptions. 28 U.S.C. §§ 1604-1607; *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989) (holding FSIA provides the "sole basis for obtaining jurisdiction over a foreign state in the courts of this country"). To obtain personal jurisdiction over a foreign state, an exception to immunity must apply and service of process must be made under § 1608(a). 28 U.S.C. § 1330(a)-(b).

Section 1608(a) prescribes the exclusive methods for serving a foreign state or its political subdivision in federal litigation. Service on a foreign state's agency or instrumentality is effected under § 1608(b).

See Fed. R. Civ. P. 4(j)(1) ("A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.").

The provisions for service under § 1608(a) are "hierarchical, such that a plaintiff must attempt the methods of service in the order they are laid out in the statute." *Magness*, 247 F.3d at 613 (citing H.R. Rep. No. 94-1487, at 24 (1976)). First, service must be effected on a foreign state pursuant to any "special arrangement for service" between the plaintiff and the foreign state. 28 U.S.C. § 1608(a)(1). If the parties lack a special arrangement for service, then process must be served "in accordance with an applicable international convention on service of judicial documents." *Id.* § 1608(a)(2).

If no convention applies, service then must be attempted on the foreign state by the third method — the provision at issue here — which requires service by "any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." *Id.* § 1608(a)(3). Finally, if service cannot be achieved under that provision within 30 days, plaintiffs must then resort to diplomatic channels, aided by the U.S. Department of State. *Id.* § 1608(a)(4).

The FSIA's service provision for foreign states, § 1608(a), differs in several ways from its provision for service on foreign states' agencies and instrumentalities, § 1608(b). Most notably, § 1608(b) allows service on an agency or instrumentality by delivery methods "reasonably calculated to give actual notice." 28 U.S.C. § 1608(b)(3). In contrast,

actual notice is not included as a consideration for effective service under § 1608(a).

Because of this distinction, courts have held that service on a foreign state requires "strict compliance" with the terms of § 1608(a), while service on agencies and instrumentalities of a foreign state requires only "substantial compliance" with § 1608(b). *See Magness*, 247 F.3d at 615, 619 n.19 (concluding that failure to serve in "strict compliance" with § 1608(a) rendered default judgment void); *Transaero*, 30 F.3d at 154 (same).

Accordingly, for service to be effective on a foreign state under the third method of service, the service documents must have been sent "by any form of mail . . . *addressed* and *dispatched* . . . *to* the head of the ministry of foreign affairs of the foreign state." 28 U.S.C. § 1608(a)(3) (emphasis added).

B. Background And Proceedings Below

On October 12, 2000, terrorists bombed the U.S.S. *Cole* as it was refueling in the Port of Aden, Yemen, killing seventeen U.S. sailors and injuring forty-two others. The terrorist organization al Qaeda and its leader Osama Bin Laden claimed "credit" for the heinous attack.

On October 2010, fifteen of the injured sailors and three of their spouses brought suit in the U.S. District Court for the District of Columbia under the FSIA, 28 U.S.C. § 1605A, seeking to hold Sudan, a sovereign nation in northeastern Africa, liable for the injuries resulting from the bombing. Plaintiffs alleged that al Qaeda was responsible for the attack

and that Sudan had provided "material support" to al Qaeda and Bin Laden. Sudan vehemently denies these allegations and expresses its deep condolences to the victims of this horrific act and their families. Sudan maintains that it should be given the opportunity to defend itself, on the merits, against the serious allegations that underlie this action.

1. District Court Proceedings (D.D.C.)

To effect service of their complaint on Sudan, Plaintiffs requested that the Clerk of the D.C. District Court mail a copy of the summons and complaint pursuant to the third method of service under the FSIA, 28 U.S.C. § 1608(a)(3). App. 128a-129a. On November 17, 2010, the documents were sent via registered mail, return receipt requested, to:

> Republic of Sudan
> Deng Alor Koul
> Minister of Foreign Affairs
> Embassy of the Republic of Sudan
> 2210 Massachusetts Avenue NW
> Washington, DC 20008

App. 132a.

The record does not show whether the papers were ever received at the Sudanese Embassy. App. 134a (showing the package's end destination as "Charlotte Hall, Maryland"). The record also does not show that the package ever was forwarded to the head of the Ministry of Foreign Affairs in Khartoum, the capital. Notably, Mr. Deng Alor Kuol was not the Minister of Foreign Affairs of Sudan at the time the papers were sent, having left office on May 30, 2010.

See U.N. Protocol & Liaison Serv., *Heads of State, Heads of Government, Ministers for Foreign Affairs* at 55 (Nov. 26, 2012).

A return receipt for the mailing, containing an illegible signature, was returned to the Clerk of the Court and received on November 23, 2010. App. 133a. No attempt was made to serve Sudan at the Ministry of Foreign Affairs in Sudan.

Sudan, in the midst of civil and political unrest, did not appear in the action, and the Clerk of the Court entered a default against Sudan. On March 30, 2012, following a hearing, the D.C. District Court entered a default judgment against Sudan finding jurisdiction and liability and awarding damages in the amount of $314,705,896. App. 22a-25a. As required under 28 U.S.C. § 1608(e), Plaintiffs sought to serve the default judgment on Sudan, pursuant to the procedures prescribed in § 1608(a). Again, the papers were mailed to Sudan's Embassy in Washington, D.C. App. 5a.

2. District Court Proceedings (S.D.N.Y.)

Plaintiffs registered the default judgment in the U.S. District Court for the Southern District of New York to begin the attachment and execution process. Plaintiffs petitioned for turnover of assets from respondent banks holding funds blocked pursuant to the Sudanese Sanctions Regulations (31 C.F.R. Part 538). The S.D.N.Y. District Court granted several of the petitions, issuing turnover orders on December 12, 2013, December 13, 2013, and January 6, 2014, in partial satisfaction of the default judgment. App. 76a-91a. Plaintiffs again purported to serve

these orders on Sudan's Minister of Foreign Affairs by U.S. mail via Sudan's Embassy in Washington, D.C.

Sudan appeared in the enforcement action, and on January 13, 2014, timely appealed all three turnover orders.

In April 2015, Sudan engaged undersigned counsel to represent its interests and help Sudan defend on the merits in all U.S. litigations against Sudan, including by moving to vacate default judgments, appealing the entry of such judgments, and moving to dismiss newly filed actions. In the present action, Sudan moved in the D.C. District Court on June 14, 2015, to vacate the default judgment under Federal Rule of Civil Procedure 60(b), for, among other reasons, failure to serve process in accordance with § 1608(a)(3). That motion remains pending.

3. Second Circuit Appeal

On appeal of the turnover orders, Sudan's principal argument was that the default judgment was void and the lower court thus lacked jurisdiction to grant the turnover petitions, because Sudan had not been served in the D.D.C. action in accordance with the FSIA. *See Magness*, 247 F.3d at 615 (holding that failure to serve in "strict compliance" with § 1608(a) rendered default judgment void and unenforceable); *Transaero*, 30 F.3d at 154 (same).

In a striking departure from decades of appellate and district court decisions declining to authorize service at a foreign state's U.S. mission or via another

agent for service, the Second Circuit affirmed the S.D.N.Y.'s turnover orders, finding that service "via" or in "care of" a sovereign's diplomatic mission in the United States was authorized. App. 11a-14a.

4. Petition For Rehearing

Sudan petitioned for rehearing or rehearing en banc, and the United States submitted a brief as amicus curiae in support of Sudan's petition.

The United States argued that the Second Circuit's holding "runs contrary to the FSIA's text and history, and is inconsistent with the United States' international treaty obligations and international practice." U.S. Br., *Harrison*, at 1 (App. 140a). The United States explained that under U.S. and international law, an "intrusion on a foreign embassy" through service by U.S. mail occurs, in violation of the Vienna Convention on Diplomatic Relations, whether the embassy "is the ultimate recipient or merely the conduit of a summons and complaint." *Id.* at 5 (App. 144a) (citing 23 U.S.T. 3227, 500 U.N.T.S. 95 art. 22). The United States also warned of "strong reciprocity interests at stake," because it rejects any attempt at service made upon the United States abroad "through an embassy." *Id.* at 6 (App. 144a-145a).

On March 11, 2016, the Panel held oral argument on the petition, and counsel for Sudan and the United States each advocated for rehearing, while counsel for plaintiffs argued otherwise.

In an opinion dated September 22, 2016, the Panel expressed "some reluctance" to diverge from the

Executive Branch's position, but nevertheless declined to grant rehearing. App. 109a, 113a. The Panel denied that its new rule conflicted with the Vienna Convention, again citing the purported distinction between serving a foreign state "on" as opposed to "via" its embassy.

In its opinion denying rehearing, the Panel also held for the first time that the purported acceptance by the Sudanese Embassy of Plaintiffs' service package constituted "consent" to entry onto its premises within the meaning of Article 22(1) of the Vienna Convention on Diplomatic Relations. App. 107a. To reach this conclusion, the Panel made a new factual finding wholly unsupported by the record — that "[i]nstead of rejecting the service papers, Sudan accepted them and then, instead of returning them, it explicitly acknowledged receiving them." *Id.* Even if such fact were true (despite the illegible signature on the return receipt and the tracking record casting serious question on the package's end destination), it would be immaterial, as Article 22(1) explicitly requires "consent of the *head of the mission*," which was never alleged, let alone shown, to have been provided here. Vienna Convention on Diplomatic Relations art. 22(1), Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (emphasis added). Because the Panel's new conclusion constructively amended the Panel's underlying Opinion, Sudan sought leave to file a Supplemental Petition in support of its pending Petition for Rehearing En Banc. The Panel denied that request.

On December 9, 2016, the Second Circuit issued an order denying rehearing en banc. App. 114a-115a.

REASONS FOR GRANTING THE PETITION

I. In Direct Conflict With Decisions Of The D.C., Fifth, And Seventh Circuits, The Second Circuit Erroneously Held That Service Mailed To Sudan's Embassy In The United States Complied With § 1608(a)(3)

Section 1608(a)(3) requires that service on a foreign state be sent "by any form of mail . . . *addressed* and *dispatched* . . . *to* the head of the ministry of foreign affairs of the foreign state." 28 U.S.C. § 1608(a)(3) (emphasis added). The natural reading of this provision is that service must be sent *directly* to the head of the ministry of foreign affairs at the ministry in the foreign state, where the minister is located. The D.C., Fifth, and Seventh Circuits follow this reading.

The D.C. Circuit made this position clear in a suit against the Embassy of Zambia. *See Barot v. Embassy of the Republic of Zambia*, 785 F.3d 26, 28, 30 (D.C. Cir. 2015). As a political subdivision of the Republic of Zambia, the Zambian Embassy was subject to service only under § 1608(a). The D.C. Circuit, emphasizing that "strict adherence to the terms of 1608(a) is required," stated that one of plaintiffs' prior attempts at service was unsuccessful because it had been attempted "at the Embassy in Washington, D.C., rather than *at the Ministry of Foreign Affairs in Lusaka, Zambia, as the Act required.*" *Id.* at 27, 28 (emphasis added). The appeals court ultimately directed that service be "sent to the head of the ministry of foreign affairs in Lusaka, Zambia." *Id.* at 30 (internal quotation marks omitted).

The D.C. Circuit in *Barot* relied on a prior D.C. Circuit decision supporting the same natural reading of § 1608(a)(3). *See Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 153-54 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1150 (1995). In *Transaero*, the appeals court vacated a default judgment as "void and unenforceable," despite the foreign state's actual notice, because service under § 1608(a)(3) had been mailed to the "Bolivian Ambassador and Consul General in Washington . . . but never the Ministry of Foreign Affairs or the Secretary of State." *Id.* at 153. Again consistent with the natural reading of § 1608(a)(3), the *Transaero* court held that § 1608(a)(3) "mandates service of the Ministry of Foreign Affairs, the department most likely to understand American procedure." *Id.* at 154.

The D.C. Circuit's position is significant, because venue over a foreign state automatically lies in that Circuit, and thus suits against sovereigns are commonly brought there, resulting in a well-developed body of law under the FSIA. *See* 28 U.S.C. § 1391(f) (establishing venue in the D.C. District Court for all civil actions brought against a foreign state).

The Fifth Circuit also has adopted the natural reading of § 1608(a)(3), holding that service on the Russian Federation and Ministry of Culture under this provision required service on the head of the Russian Ministry of Foreign Affairs, "through the Ministry of Foreign Affairs." *Magness v. Russian Fed'n*, 247 F.3d 609, 613 (5th Cir. 2001), *cert. denied*, 534 U.S. 892 (2001). The Fifth Circuit categorically rejected plaintiffs' attempt to serve Russia and its

political subdivision by papers transmitted by the Texas Secretary of State to Russia "c/o" or in "care of" Boris Yeltsin and to the Ministry of Culture in "care of" the Deputy Minister of Culture. *Id.* at 611.

The Seventh Circuit has followed this interpretation as well. In *Alberti v. Empresa Nicaraguense De La Carne*, the appeals court held that service was improper because it had not been mailed to the head of Nicaragua's ministry of foreign affairs, but rather to the Nicaraguan Ambassador in Washington, D.C. 705 F.2d 250, 253 (7th Cir. 1983). In support of its holding, the Seventh Circuit found that § 1608(a)(3), as instructed by the statute's legislative history, "precluded" service by mail upon an embassy. *Id.* The prohibition on embassy service was followed in *Autotech Technologies LP v. Integral Research & Development Corp.*, 499 F.3d 737, 748-49 (7th Cir. 2007), *cert. denied*, 552 U.S. 1231 (2008) ("service *through* an embassy is expressly banned both by an international treaty to which the United States is a party and by U.S. statutory law" (emphasis added)). A number of district courts have reached the same conclusion. *See, e.g., Ellenbogen v. Canadian Embassy*, No. 05-1553, 2005 WL 3211428, at *2 (D.D.C. Nov. 9, 2005) (service of process on embassy does not satisfy § 1608(a)); *Lucchino v. Foreign Countries of Brazil, South Korea, Spain, Mexico, & Argentina*, 631 F. Supp. 821, 827 (E.D. Pa. 1986) (same).

The United States has repeatedly urged that § 1608(a)(3) requires service on the foreign minister at the ministry in the foreign state, and not on or through an agent for forwarding. In the Second

Circuit proceedings below, the United States stated: "The most natural understanding of [§ 1608(a)(3)] is that the mail will be sent to the head of the ministry of foreign affairs at his or her regular place of work — *i.e.*, at the ministry of foreign affairs in the state's seat of government — not to some other location for forwarding." U.S. Br., *Harrison*, at 2 (App. 141a). Similarly, in Sudan's appeal of another case involving the same service issue, currently pending before the Fourth Circuit, the United States has explained:

> [N]aturally read, the provision requires delivery to the official's principal place of business, the ministry of foreign affairs in the foreign state's seat of government. A state's foreign minister does not work in the state's embassies. Had Congress contemplated delivery to embassies, it would have enacted a statute requiring service to be addressed to the foreign state's ambassador.

Brief for United States as Amicus Curiae at 8-9, *Kumar v. Republic of Sudan*, No. 16-2267 (4th Cir. Feb. 7, 2017), ECF No. 25-1 (App. 160a-161a); *see also* Statement of Interest of the United States at 4, *Dorsey v. Gov't of China*, No. 08-cv-1276 (D.D.C. Dec. 31, 2008), ECF No. 10 (arguing that § 1608(a)(3) requires "the clerk of court to mail the suit papers to the ministry of foreign affairs *in the PRC*" (emphasis added)); Brief of the United States as Amicus Curiae at 16, *Swezey v. Merrill Lynch*, 997 N.Y.S. 2d 45 (N.Y. App. Div. 2014) (No. 155600/13) ("None of the available methods [under the FSIA] includes service by mailing papers to a consulate or embassy . . . .").

Rejecting the natural reading, and departing significantly from the D.C., Fifth, and Seventh Circuits, the Second Circuit below concluded that service addressed and mailed to the foreign minister at the Sudanese Embassy in the United States satisfied § 1608(a)(3). The Panel reasoned that service "via" or in "care of" an embassy was permissible under § 1608(a)(3) because the plain language of the statute did not prohibit it. App. 10a-11a, 13a-14a. The Panel presumed that mailing the papers to the Embassy would satisfy § 1608(a)(3), because once the papers were received by the Embassy, they "can be forwarded to the minister [in the foreign state] by diplomatic pouch." App. 14a.

The Panel supported its opinion by pointing to two district court decisions from the Eastern District of Virginia that held that "service on a minister of foreign affairs via an embassy constitutes literal compliance with [§ 1608(a)(3)]." App. 11a-12a (citing *Rux v. Republic of Sudan*, No. 2:04-cv-428, 2005 WL 2086202, at *16 (E.D. Va. Aug. 26, 2005); *Wye Oak Tech., Inc. v. Republic of Iraq*, No. 1:09-cv-793, 2010 WL 2613323, at *5-6 (E.D. Va. June 29, 2010)). The service conclusion in *Rux* was, however, dicta. *Rux*'s actual holding was that Sudan's former counsel had *waived* personal jurisdiction by making the service argument in their brief but not their cover motion. *Rux*, 2005 WL 2086202, at *2. *Wye Oak* simply relied on that dicta from *Rux*. Moreover, the *Rux* and *Wye Oak* plaintiffs, unlike Plaintiffs here, also had served process under § 1608(a)(4), so service via the embassy was supplemental to valid service.

The Panel resisted the argument that its holding conflicted with D.C., Fifth, and Seventh Circuit cases. App. 12a-13a; App. 103a-104a. It observed that none of those cases held "that the mailing of papers addressed to the minister of foreign affairs via an embassy does *not* comply with the statute." App. 103a. The Panel's attempted distinction, with which the United States has expressly disagreed (U.S. Br., *Harrison*, at 5-6 (App. 144a)), cannot be sustained, nor can it so easily dispense with the circuit conflict its Opinion has created. No meaningful distinction exists between service "via" an embassy and service "on" an embassy. A foreign state's embassy or other diplomatic mission has no legal personality distinct from the foreign state itself. *See, e.g., Barot*, 785 F.3d at 27-30 (holding that an embassy, as a "political subdivision" of the state, must be served in "strict compliance" with terms of § 1608(a)). As the United States has explained, the "intrusion on a foreign embassy is present whether [the embassy] is the ultimate recipient or merely the conduit of a summons and complaint." U.S. Br., *Harrison*, at 5 (App. 144a). In any event, the Panel's conclusion is inherently contradictory, namely that an embassy cannot be served directly in any suit against it (because the embassy *is part of* the foreign state), but that service *via* the embassy would be acceptable where the foreign state is the defendant.

The Panel also attempted to mask the circuit split it has created by brushing aside several appeals court decisions. For example, it suggested that the Fifth Circuit in *Magness* rejected plaintiffs' attempt to serve Russia by forwarding documents *to* Boris Yeltsin and the Minister of Culture (App. 12a), but in

fact, the Fifth Circuit had rejected *the very scenario the Second Circuit authorizes below*: service sent "c/o" or in "care of" an agent associated with the foreign state. *See Magness*, 247 F.3d at 611, 613. Likewise, the Second Circuit described the issue in *Barot* as involving a "service package addressed to embassy" (App. 104a), but it conveniently ignored that the D.C. Circuit repeatedly emphasized that the *only* effective service on the Zambian embassy for the suit against it was service under § 1608(a)(3) *at* the Ministry of Foreign Affairs *in Zambia*. *See Barot*, 785 F.3d at 28, 30.

Beyond its quick dismissal of prior appellate cases and radical departure from the natural reading of the statute, the Panel's reasoning is flawed for a number of reasons.

First, the Panel reasoned that Congress could have limited the place of mailing if it had wanted, as evident in the contrast between § 1608(a)(3) and § 1608(a)(4). App. 10a-11a. Section 1608(a)(4) specifies that the papers be mailed "to the Secretary of State *in Washington, District of Columbia*." The inclusion, however, of "in Washington, District of Columbia" in § 1608(a)(4) is necessary in order to distinguish the secretary of state for the U.S. government sitting in the District of Columbia from the secretaries of state located in each of the 50 states. A similar specification of location is not necessary, or possible, with respect to a minister of foreign affairs in § 1608(a)(3), because each foreign state only has *one* such minister, who is located at the ministry, generally in the foreign state's capital city.

Second, the Panel's conclusion that § 1608(a) authorizes an agent, here the Embassy, to transmit the service papers to the minister of foreign affairs is unsupportable when read in the context of both §§ 1608(a) and (b). Section 1608(b) expressly permits service on a state's agencies and instrumentalities by delivery to an "officer, a managing or general agent, or to any other [authorized] agent." Section 1608(a), on the other hand, makes no reference to an officer or agent with regard to service on the foreign state itself. As the United States has argued, "[t]hat difference strongly suggests that Congress did not intend to allow service on a foreign state via delivery to any entity that could, by analogy, be considered the foreign state's officer or agent, including the state's embassy, even if only for purposes of forwarding papers to the foreign ministry." U.S. Br., *Harrison*, at 3 (App. 142a).

Third, the Panel's reading of § 1608(a)(3) renders its terms inconsistent with obligations of the United States under the Vienna Convention. This reading is not permitted because § 1604 of the FSIA makes clear that all provisions of the Act are "[s]ubject to existing international agreements to which the United States is a party at the time" of its enactment. 28 U.S.C. § 1604. The United States was a party to the Vienna Convention on Diplomatic Relations at the time of the enactment of the FSIA in 1976. *See* 23 U.S.T. 3227 (entered into force with respect to the United States on December 13, 1972). Article 22 of the Vienna Convention provides that "the premises of the mission shall be inviolable."

Under U.S. and international law, it is well established that Article 22 prohibits service of process on a sovereign's embassy, consulate, and diplomatic officers. *See, e.g.*, *Autotech Techs.*, 499 F.3d at 748 ("service through an embassy is expressly banned" by Vienna Convention); Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 124 (4th ed. 2016) ("The view that service by post on mission premises is prohibited seems to have become generally accepted in practice."); James Crawford, *Brownlie's Principles of Public International Law* 403 (8th ed. 2012) ("It follows from Article 22 that writs cannot be served, even by post, within the premises of a mission but only through the local Ministry for Foreign Affairs."); Ludwik Dembinski, *The Modern Law of Diplomacy* 193 (1988) ("[Article 22] protects the mission from receiving by messenger or by mail any notification from the judicial or other authorities of the receiving State.").

Accordingly, to the extent there was any ambiguity about the proper reading of § 1608(a)(3), the Panel should have interpreted the provision to be consistent with U.S. obligations under the Vienna Convention. *See* Restatement (Third) of the Foreign Relations Law of the United States § 114 (Am. Law Inst. 1986) ("Where fairly possible, a United States statute is to be construed so as not to conflict with . . . an international agreement of the United States."); *Roeder v. Islamic Republic of Iran*, 646 F.3d 56, 61 (D.C. Cir. 2003) ("Legislation abrogating international agreements must be clear to ensure that Congress — and the President — have considered the consequences. An ambiguous statute

cannot supercede an international agreement if an alternative reading is fairly possible." (internal quotation marks and citation omitted)).

The Panel could have corrected this error on rehearing, following receipt of the U.S. government's brief explaining the Panel Opinion's divergence from the Vienna Convention's inviolability principle. The Panel, however, compounded its error by rejecting the United States' interpretations of the Vienna Convention. App. 105a, 109a; *cf. Abbott v. Abbott*, 560 U.S. 1, 15 (2010); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982).

Finally, the Panel failed to properly and fully consider § 1608's legislative history. Contrary to the Panel's suggestion (App. 13a), the legislative history of § 1608 is extensive and establishes that service by mail via a foreign state's embassy contravenes Article 22 of the Vienna Convention and thus was purposely *excluded* from § 1608.

Specifically, while the first version of the bill that became the FSIA allowed for service against a foreign state by "registered or certified mail . . . to the ambassador or chief of mission of the foreign state" in conjunction with service through the diplomatic channels via the State Department (S. 566, 93d Cong. § 1608 (1973)), the text was revised to accommodate the complaints of foreign missions that a mailing to the embassy would violate Article 22. *See* 71 Dep't of State Bull. 458-59 (1974).

Further amendments to H.R. 11315 (which ultimately became the FSIA) edited § 1608(a) to require that mailed service be addressed "to the head

of the ministry of foreign affairs of the foreign state concerned." 122 Cong. Rec. 33,536 (1976) (enacted). The House Report on H.R. 11315 reiterated that the new § 1608(a) precluded a mailing "to a diplomatic mission of the foreign state . . . so as to avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention." H.R. Rep. No. 94-1487 at 26 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6625.

The Panel below considered the House Report but quickly dismissed it on the basis that the report "fails to make the distinction at issue in the instant case, between 'service *on* an embassy by mail,' and service on a minister of foreign affairs *via* or *in care of* an embassy." App. 13a (alterations in original, internal citations omitted). Yet again, the Panel cited no authority, beyond two cases of the Eastern District of Virginia, to support this novel and artificial distinction.

The overwhelming weight of authority — including decisions from three circuits, the text and history of the FSIA, and the views of the United States — contradicts the Second Circuit's rule. Only this Court can correct this split in authority. Indeed, further emphasizing the serious need for uniformity in the treatment of foreign states in U.S. courts, the question presented here also is pending presently in a case before the Fourth Circuit, indicating that the circuit split could further deepen absent guidance from this Court. *See Kumar v. Republic of Sudan*, No. 16-2267 (4th Cir.).

II. The Question Presented Is Of Significant And Immediate National Importance

A. The Panel Opinion Places The United States In Violation Of Its Obligations Under The Vienna Convention

The United States maintained below, consistent with its position in many other cases, that the Panel Opinion contravenes the Vienna Convention on Diplomatic Relations. *See* U.S. Br., *Harrison*, at 1 (App. 140a) (urging rehearing of the Panel Opinion because interpreting § 1608(a)(3) to permit service *via* Sudan's Embassy "is inconsistent with the United States' international treaty obligations and international practice"); *see also* Brief for the United States as Amicus Curiae at 13, *Kumar v. Republic of Sudan*, No. 16-2267 (4th Cir. Feb. 7, 2017), ECF No. 25-1 (App. 164a-165a) ("[t]he courts owe deference to" the United States' interpretation of the Vienna Convention as precluding mail "to a foreign embassy as a means of serving a foreign state"); Suggestion of Immunity and Statement of Interest of the United States at 13-14, *Hmong I v. Lao People's Democratic Republic*, No. 2:15-cv-2349 (E.D. Cal. Feb. 12, 2016), ECF No. 23 (service upon Laos via its embassy contravened Article 22 of the Vienna Convention); Statement of Interest of the United States at 12, *Avelar v. J. Cotoia Const. Inc.*, 2011 WL 5245206 (E.D.N.Y. Nov. 2, 2011) (No. 11-2172), ECF No. 14 ("The principle of mission inviolability set forth in Article 22 precludes service of process on the premises of a mission."); Brief of the United States as Amicus Curiae at 16, *Swezey v. Merrill Lynch*, 997 N.Y.S. 2d 45 (N.Y. App. Div. 2014) (No. 155600/13)

(service on Philippines through U.S. embassy and consulate "is inconsistent with the United States' international treaty obligations"); *id.* at 20 (stating that court order requiring service of legal documents upon embassy violates Article 22 and was "unlawful"). Widespread adherence to the Vienna Convention is one of the essential pillars of foreign relations. *See* Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 1-2 (4th ed. 2016) (explaining that the Vienna Convention has "a remarkably high degree of observance" and is a "cornerstone of the modern international legal order").

The United States' interpretation of its treaties is "entitled to great weight." *Abbott v. Abbott*, 560 U.S. 1, 15 (2010). Moreover, where the parties to a treaty both agree on its interpretation, U.S. courts must defer to that interpretation "absent extraordinarily strong contrary evidence." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982). The Second Circuit, however, all but ignored the views and treaty obligations of the United States, leaving Sudan indebted by a default judgment of over $300 million.

In denying rehearing, the Panel attempted to square its interpretation of § 1608(a)(3) with Article 22, again emphasizing that its new rule permits only service "via," not "on," an embassy. App. 105a-106a. But the Panel offered no basis to sustain that artificial distinction under either U.S. or international law, and instead defended its Opinion by stating in conclusory fashion that it did "not hold that an embassy is an agent for service or a proxy for

service for a foreign state." App. 101a. But that is precisely what the Panel held: that a foreign state's embassy may be required to act as a forwarding agent for service of legal process in private litigation. As the United States observed:

> The panel assumed that the papers would be forwarded on to the foreign minister via diplomatic pouch, which is provided with certain protections under the [Vienna Convention] to ensure the safe delivery of "diplomatic documents and articles intended for official use." But one sovereign cannot dictate the internal procedures of the embassy of another sovereign, and a foreign government may well object to a U.S. court instructing it to use its pouch to deliver items to its officials on behalf of a third party.

U.S. Br., *Harrison*, at 5-6 (App. 144a) (citation omitted).

The Panel Opinion constitutes a direct violation of the principle of inviolability under Article 22 by requiring a foreign mission to place U.S. service of process in the mission's diplomatic pouch. Furthermore, the Panel Opinion does not foreclose the possibility that, given the statute's purported "silence" on the location for service, addressing the mailing to other non-ministry addresses may yet be permitted. Embassies, consulates, U.N. missions, and military outposts all could be tasked with transmitting service of process on behalf of a third party to the minister of foreign affairs under the

Second Circuit's rule. And if service is not properly transmitted onwards to the minister of foreign affairs by any one of those entities, foreign states could face the very real prospect of having default judgments enforced against them, as Sudan has in this case.

This issue is not hypothetical. Dozens of FSIA cases are initiated against foreign states each year, and over a hundred foreign states are subject to potential service under § 1608(a)(3) because they are not signatories to "an applicable international convention on service of judicial documents." 28 U.S.C. § 1608(a)(2); *see* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163; Inter-American Convention on Letters Rogatory, Jan. 30, 1975, S. Treaty Doc. No. 98-27, 1438 U.N.T.S. 288; Additional Protocol to the Inter-American Convention on Letters Rogatory, May 8, 1979, 1438 U.N.T.S. 322. Already plaintiffs have begun taking advantage of the option of serving foreign state defendants at their embassies and consulates in the United States. *See, e.g.*, Letter at 2, *Park v. Embassy of Indonesia*, No. 1:16-cv-6652 (E.D.N.Y. Feb. 13, 2017), ECF No. 7 (mailing service documents to Indonesia's embassy in Washington, D.C.); Proof of Service Ex. A at 1, *Hmong I v. Lao People's Democratic Republic*, No. 2:15-cv-2349 (E.D. Cal. Dec. 28, 2015), ECF No. 9 (delivering service documents to Laos through its embassy and ambassador in Washington, D.C.); *see also* Order at 2, *Pereira v. Consulate Gen. of Brazil in N.Y.*, No. 15-cv-2593 (S.D.N.Y. Dec. 29, 2015), ECF No. 15 (ordering plaintiff to move the clerk for service upon Brazilian consulate in New York under

§ 1608(a)(3) and advising plaintiff that "it is permissible to serve the head of a country's ministry of foreign affairs via that country's diplomatic mission" pursuant to *Harrison*).

The Panel Opinion threatens the serious erosion of the Vienna Convention, and this Court should review the case to prevent any future diplomatic complications or disputes.

B. The Panel Opinion Compromises U.S. Interests Abroad

The Panel's disregard for the Vienna Convention also exposes the United States to reciprocal treatment in foreign courts. Illustrating the gravity of its concern, the United States submitted a statement of interest both in the proceedings below and in the pending Fourth Circuit appeal (*Kumar v. Republic of Sudan*, No. 16-2267 (4th Cir.)). As the United States elaborated:

> [T]he United States routinely refuses to recognize the propriety of a private party's service through mail or personal delivery to the United States embassy. When a foreign litigant . . . purports to serve the United States through its embassy, the embassy sends a diplomatic note to the foreign government explaining that the United States does not consider itself to have been served consistently with international law and thus will not appear in the litigation or honor any

> judgment that may be rendered against it.

Brief for United States as Amicus Curiae at 13-14, *Kumar v. Republic of Sudan*, No. 16-2267 (4th Cir. Feb. 7, 2017), ECF No. 25-1 (App. 165a).

Indeed, the United States has appeared in a significant number of U.S. cases to defend its interests from the consequences of authorizing service of process via embassies, and U.S. courts have recognized these concerns. *See, e.g.*, Brief of the United States as Amicus Curiae at 19, *Swezey v. Merrill Lynch*, 997 N.Y.S. 2d 45 (N.Y. App. Div. 2014) (No. 155600/13) (recognizing that allowing service of process on a foreign sovereign's embassy or diplomatic mission "can cause significant friction in [its] foreign relations" and that the United States "routinely objects to attempts by private parties or foreign courts to serve [the] U.S. diplomatic missions or consulates overseas"); Brief of the United States as Amicus Curiae at 3, *Magness v. Russian Fed'n*, 247 F.3d 609 (5th Cir. May 30, 2000) (No. 00-20136) ("[P]roper service of process against the United States in foreign courts is of enormous importance to the Federal Government. If United States courts follow the service rules established for suits against foreign states, . . . that practice will increase the likelihood that the United States will be treated properly in foreign courts, according to developed service of process rules . . . ."); *see also 767 Third Ave. Assocs. v. Permanent Mission of Zaire*, 988 F.2d 295, 300-01 (2d Cir. 1993) ("Were the United States to adopt exceptions to the inviolability of foreign missions here, it would be stripped of its most powerful

defense, that is, that international law precludes the nonconsensual entry of its missions abroad.").

For decades, the United States has routinely and actively resisted attempts at service of foreign litigation mailed to its embassies and consulates, citing Article 22 of the Vienna Convention. In one such example, the United States objected to service by mail delivered to its Toronto Consulate, maintaining that "because service was defective, the United States is not a party to [the] case and therefore, the United States will not respond." *United States v. Zakhary*, [2015] F.C. 335, para. 6 (Can. Fed. Ct.). Service in that case was ultimately found ineffective.

As the statements and objections of the United States make plain, the potential consequences of the Second Circuit's departure from seemingly settled law are considerable and warrant immediate review.

Finally, the recent improvement in relations between the United States and Sudan supports review in this case. Over the last several years, Sudan has worked diligently and cooperatively with the United States to address regional conflicts and combat the threat of terrorism. As a result of this cooperation, as well as other positive actions by Sudan over the past year, the United States announced on January 13, 2017 that it was lifting certain country-wide sanctions that had been imposed against Sudan for nearly twenty years. Exec. Order No. 13761, 82 Fed. Reg. 5331 (Jan. 13, 2017). The Second Circuit's endorsement of defective service of process against a foreign state runs counter to the United States' interests in

improving relations with sovereigns such as Sudan, a sovereign that has repeatedly expressed its good-faith commitment to defending the merits of this case and others like it.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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March 9, 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed 09/23/2015]

August Term 2014

(Argued: January 5, 2015
Decided: September 23, 2015)

Docket No. 14-121-cv

RICK HARRISON, JOHN BUCKLEY, III, MARGARET LOPEZ, ANDY LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, MARTIN SONGER, JR., SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE, TRACEY SMITH, as personal representative of the Estate of Rubin Smith,

Plaintiffs-Appellees,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant,

ADVANCED CHEMICAL WORKS, AKA Advanced Commercial and Chemical Works Company Limited, AKA Advanced Training and Chemical Works Company Limited, Accounts & Electronics Equipments, AKA Accounts and Electronics Equipments, et al.,

Defendants,

NATIONAL BANK OF EGYPT, CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK,

Respondents.[*]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Before:

LYNCH and CHIN, *Circuit Judges*, and KORMAN, *District Judge*.[**]

Appeal from three orders of the United States District Court for the Southern District of New York (Torres, *J.*), requiring respondent banks holding assets of defendant-appellant Republic of Sudan to turn over funds to satisfy an underlying default judgment obtained by plaintiffs-appellees against the Republic of Sudan in the United States District Court for the District of Columbia. The Republic of Sudan contends that (1) service of process did not comply with the Foreign Sovereign Immunities Act, and (2) the District Court erred by attaching assets of a foreign state to satisfy a judgment under the Terrorism Risk Insurance Act without authorization from the Office of Foreign Assets Control or a Statement of Interest from the Department of Justice.

AFFIRMED.

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[*] The Clerk of Court is respectfully requested to amend the caption as set forth above.

[**] The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

ANDREW C. HALL (Brandon Levitt, *on the brief*), Hall, Lamb and Hall, P.A., Miami, Florida, *for Plaintiffs-Appellees*.

ASIM GHAFOOR, Law Office of Asim Ghafoor, Washington, D.C., *for Defendant-Appellant*.

CHIN, *Circuit Judge*:

On October 12, 2000, an explosive-laden skiff pulled up alongside the U.S.S. Cole, which was docked for refueling at the port of Aden, Yemen, and detonated. Seventeen U.S. Navy sailors were killed in the attack, and forty-two wounded. Fifteen of the injured sailors and three of their spouses brought suit in 2010 in the United States District Court for the District of Columbia (the "D.C. District Court") under the Foreign Sovereign Immunities Act (the "FSIA"), 28 U.S.C. §§ 1330, 1602 *et seq.*, alleging that al Qaeda was responsible for the attack and that the Republic of Sudan ("Sudan") had provided material support to al Qaeda. In 2012, the D.C. District Court entered a default judgment against Sudan in the amount of $314,705,896.

Plaintiffs registered the default judgment in the United States District Court for the Southern District of New York, and then sought to enforce it against funds held by New York banks. The District Court below (Torres, *J.*) issued the three turnover orders before us.

We hold that (1) service of process on the Sudanese Minister of Foreign Affairs via the Sudanese Embassy in Washington, D.C., complied with the FSIA's requirement that service be sent to the head of the ministry

of foreign affairs, and (2) the District Court did not err in issuing the turnover orders without first obtaining either a license from the Treasury Department's Office of Foreign Assets Control ("OFAC") or a Statement of Interest from the Department of Justice ("DOJ").

We affirm.

STATEMENT OF THE CASE

Plaintiffs-appellants are sailors and spouses of sailors injured in the bombing of the U.S.S. Cole, who brought suit against Sudan in the D.C. District Court on October 4, 2010, under 28 U.S.C. § 1605A, the terrorism exception to the FSIA, alleging that Sudan provided material support to al Qaeda, whose operatives perpetrated the attack on the vessel.[1]

Pursuant to 28 U.S.C. § 1608(a)(3), plaintiffs filed an Affidavit Requesting Foreign Mailing on November 5, 2010, asking that the Clerk of Court mail the summons and complaint via registered mail, return receipt requested, to:

> Republic of Sudan
> Deng Alor Koul
> Minister of Foreign Affairs
> Embassy of the Republic of Sudan
> 2210 Massachusetts Avenue NW
> Washington, DC 2008

S. App. at 66. As represented by plaintiffs, Deng Alor Koul was the Minister of Foreign Affairs of Sudan at the time.

On November 17, 2010, the Clerk of Court entered a Certificate of Mailing certifying that the summons

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[1] One of the sailors died after the suit was brought. His spouse, as representative of his estate, was substituted into the action.

and complaint were sent via domestic certified mail to the "head of the ministry of foreign affairs," at the Sudanese Embassy in Washington, D.C., *id.* at 67, and that the return receipt was returned to the Clerk of Court and received on November 23, 2010. No attempt was made to serve Sudan at the Ministry of Foreign Affairs in Khartoum, the capital. Sudan failed to serve an answer or other responsive pleading within sixty days after plaintiffs' service, *see* 28 U.S.C. § 1608(d), and the Clerk of Court thus entered a default against Sudan.

On March 30, 2012, after a hearing, the D.C. District Court (Lamberth, *J.*) entered a default judgment against Sudan in the amount of $314,705,896, *Harrison v. Republic of Sudan*, 882 F. Supp. 2d 23, 51 (D.D.C. 2012), and found, *inter alia*, that service on Sudan had been proper, *id.* at 28.[2] Following entry of the default judgment, plaintiffs filed a second Affidavit Requesting Foreign Mailing, requesting the Clerk to mail notice, this time of the Order and Judgment and the Memorandum Opinion entered by the D.C. District Court, by registered mail, return receipt requested. The Clerk certified in April 2012 that the documents had been mailed to Sudan's Minister of Foreign Affairs via the Sudanese Embassy in Washington, D.C. Sudan again failed to appear or contest the judgment.

On October 2, 2012, plaintiffs registered the judgment in the Southern District of New York, seeking to execute against respondent banks holding Sudanese

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[2] After oral argument in the instant appeal, Sudan made a Rule 60(b) motion in the D.C. District Court to set aside the default judgment. *Harrison v. Republic of Sudan*, No. 10-CV-1689 (D.D.C. June 14, 2015) (Docket No. 55). Sudan moved to hold this appeal in abeyance pending resolution of the motion for vacatur. We deny the motion.

assets frozen pursuant to the Sudan Sanctions Regulations, *see* 31 C.F.R. Part 538, and on May 9, 2013, plaintiffs filed a Notice of Pending Action.

On June 28, 2013, following a motion by plaintiffs, the D.C. District Court entered an order finding that post-judgment service had been effectuated, and that sufficient time had elapsed following the entry of judgment and the giving of notice of such judgment to seek attachment and execution, pursuant to 28 U.S.C. § 1610(c).[3] On September 20, 2013, the district court below entered a similar order, finding both that sufficient time had passed since entry of the default judgment, and that service of the default judgment had been properly effectuated. Sudan failed to challenge these orders.

Plaintiffs then filed a series of petitions in the Southern District seeking turnover of Sudanese assets, including against Mashreqbank, BNP Paribas, and Credit Agricole Corporate and Investment Bank. The District Court granted the petitions, issuing turnover orders on December 12, 2013, December 13, 2013, and January 6, 2014, respectively. Plaintiffs served all three petitions, as well as their § 1610(c) motion, by U.S. mail addressed to Sudan's Minister of Foreign Affairs – at that point Ali Ahmed Karti, who had replaced Deng Alor Koul as represented by plaintiffs – via the Embassy of Sudan in Washington.

Sudan filed its notice of appearance on January 13, 2014, only after all three turnover orders were entered

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[3] Section 1610(c) provides that "[n]o attachment or execution . . . shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter."

by the District Court below. The same day, Sudan timely appealed.[4]

DISCUSSION

Two issues are presented: (a) whether service of process on the Sudanese Minister of Foreign Affairs via the Sudanese Embassy in Washington complied with the requirement of 28 U.S.C. § 1608(a)(3) that service be sent to the head of the ministry of foreign affairs, and (b) whether the District Court erred in

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[4] As a threshold matter, plaintiffs contend that this Court lacks jurisdiction over the December 12, 2013 and December 13, 2013 orders, and that the appeal is timely only with respect to the January 6, 2014 order, because the notice of appeal was not filed until January 14, 2014. Sudan was required to file a notice of appeal "with the district court clerk within 30 days after entry of the judgment or order appealed from," Fed. R. App. P. 4(a)(1)(A), and "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement," *Bowles v. Russell*, 551 U.S. 205, 214 (2007). Sudan did in fact file a notice of appeal on January 13, 2014, the last day for timely filing of an appeal from the earliest order. Though Sudan neglected to manually select the orders it was appealing on ECF, triggering a "filing error" in the docket entry, Docket No. 34, the notice of appeal was accessible on the docket, the notice itself stated in plain language the three orders at issue, and Sudan corrected the electronic error the next day, by filing an otherwise identical order on January 14, 2014. Because there was no ambiguity in Sudan's January 13, 2014 notice of appeal, the appeal is timely as to all three turnover orders. *See Becker v. Montgomery*, 532 U.S. 757, 767 (2001) ("[I]mperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court."); *see also Contino v. United States*, 535 F.3d 124, 127 (2d Cir. 2008) ("[T]he failure to sign [a notice of appeal] may be remedied after the time period for filing the notice has expired."); *New Phone Co. v. City of New York*, 498 F.3d 127, 131 (2d Cir. 2007) ("Our jurisdiction . . . depends on whether the intent to appeal from that decision is clear on the face of, or can be inferred from, the notices of appeal.").

issuing turnover orders without first obtaining either an OFAC license or a DOJ Statement of Interest explaining why no OFAC license was required.

A. *Service of Process on the Minister of Foreign Affairs*

The FSIA provides the sole means for effecting service of process on a foreign state. *See* 28 U.S.C. § 1608(a); H.R. Rep. No. 94-1487, at 23 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6622 ("Section 1608 sets forth the exclusive procedures with respect to service on . . . a foreign state . . . ."). Four methods of service are prescribed, in descending order of preference. 28 U.S.C. § 1608(a)(1)-(4). Plaintiffs must attempt service by the first method, or determine that it is unavailable, before attempting subsequent methods in the order in which they are laid out.

The first method is service "in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision." *Id.* § 1608(a)(1). In the absence of such a special arrangement, the statute next permits service "in accordance with an applicable international convention on service of judicial documents." *Id.* § 1608(a)(2). If neither of these first two methods is available, plaintiffs may proceed according to the third method, which permits service "by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court *to the head of the ministry of foreign affairs of the foreign state concerned*." *Id.* § 1608(a)(3) (emphasis added). Finally, the statute provides that if service cannot be made under the first three paragraphs, service is permitted as a last resort "by any form of mail

requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services – and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state." *Id.* § 1608(a)(4).

Here, it is undisputed that service in conformity with the first two methods was unavailable, because plaintiffs have no "special arrangement" for service with Sudan, and because Sudan is not a party to an "international convention on service of judicial documents." *Id.* §1608(a)(1)-(2). Thus, § 1608(a)(3) was the preferred method of service, and plaintiffs effectuated service in accordance with this paragraph. In the underlying litigation in the D.C. District Court, the Clerk of Court sent process by U.S. mail, return receipt requested, to the Minister of Foreign Affairs, Deng Alor Koul, via the Embassy of Sudan in Washington, D.C.

As an initial matter, plaintiffs complied with the first three clauses of 28 U.S.C. § 1608(a)(3). First, service could not be made under paragraphs (1) or (2) of § 1608(a). Second, plaintiffs directed the Clerk of Court to include in the service package a copy of the summons and complaint, and notice of suit, and the Clerk confirmed that a translation of each was included. And third, plaintiffs directed the clerk of court to serve Sudan by a "form of mail requiring a signed receipt," *id.* § 1608(a)(3), and, after the clerk mailed the service package on November 17, 2010, a

return receipt was in fact received on November 23, 2010.[5]

On appeal, Sudan argues that service on Sudan's Minister of Foreign Affairs via the Sudanese Embassy in Washington does not comply with the requirement of the final clause of 28 U.S.C. § 1608(a)(3), that service be sent "to the head of the ministry of foreign affairs." Sudan contends that service should have been sent to Sudan's Minister of Foreign Affairs at the Ministry of Foreign Affairs in Khartoum, and because service was ineffective under § 1608(a), the D.C. District Court lacked personal jurisdiction over Sudan.

In answering this issue, one of first impression in our Circuit, we look to the statutory language, cases that have interpreted this statute, and the legislative history. *See United States v. Allen*, 788 F.3d 61, 66 (2d Cir. 2015).

On its face, the statute requires that process be mailed "to the head of the ministry of foreign affairs of the foreign state." 28 U.S.C. § 1608(a)(3). It is silent as to a specific location where the mailing is to be addressed. If Congress had wanted to require that the mailing be sent to the head of the ministry of foreign affairs in the foreign county, it could have said so. In

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[5] At oral argument, counsel for Sudan represented that the Minister of Foreign Affairs did not have actual notice of the underlying suit because at the time of the mailing to the Embassy, Sudan was in the final months of a coalition government with the Sudan People's Liberation Movement, before South Sudan became independent. According to counsel, due to the structure of the power-sharing agreement the Minister of Foreign Affairs would not have received notice from the opposition-controlled Embassy. But on the record before us we can look only at the service as it was mailed and received by the Embassy, and whether that service satisfied the statute.

§ 1608(a)(4), for example, Congress specified that the papers be mailed "to the Secretary of State *in Washington, District of Columbia*, to the attention of the Director of Special Consular Services," for transmittal to the foreign state "through diplomatic channels." *Id.* § 1608(a)(4) (emphasis added). Nothing in § 1608(a)(3) requires that the papers be mailed to a location in the foreign state, and the method chosen by plaintiffs – a mailing addressed to the minister of foreign affairs at the embassy – was consistent with the language of the statute and could reasonably be expected to result in delivery to the intended person.

What little case law there is on this question accords with our reading of § 1608(a)(3), that service on a minister of foreign affairs via an embassy address constitutes literal compliance with the statute. This is not the first time that Sudan has made the argument for a more restrictive reading of § 1608(a)(3). In *Rux v. Republic of Sudan*, the Eastern District of Virginia rejected Sudan's contention that service had to be mailed directly to the Minister of Foreign Affairs at the Ministry of Foreign Affairs in Khartoum, rather than to the Minister of Foreign Affairs via the Sudanese Embassy. No. 04-CV-428, 2005 WL 2086202, at *16 (E.D. Va. Aug. 26, 2005), *aff'd on other grounds*, 461 F.3d 461 (4th Cir. 2006). The district court found that "[t]he text of § 1608(a)(3) does not prohibit service on the Minister of Foreign Affairs at an embassy address. Indeed, the statute does not prescribe the place of service, only the person to whom process must be served." *Id.*

In another case, *Wye Oak Technology, Inc. v. Republic of Iraq*, the Eastern District of Virginia similarly held that service via an embassy is sufficient to satisfy the FSIA as long as the service is directed to

the Minister of Foreign Affairs. No. 09-CV-793, 2010 WL 2613323, at *5-6 (E.D. Va. June 29, 2010), *aff'd on other grounds*, 666 F.3d 2015 (4th Cir. 2011). In *Wye Oak*, a summons was issued by the clerk of the court to the "Head of the Ministry of Foreign Affairs of Iraq, care of the Embassy of the Republic of Iraq in Washington, DC." *Id.* at *4 (internal quotation marks omitted). The district court found that:

> Section (a)(3) does not impose a requirement that an otherwise proper service package must be delivered to a particular destination. No doubt, the address to which the service package is directed must bear some objectively reasonable relationship to the head of the Ministry of Foreign Affairs and the chosen method of delivery must have some reasonable expectation of success. However, there is nothing on the face of Section (a)(3) that prohibits [plaintiff]'s chosen method of delivery to the head of the Ministry of Foreign Affairs . . . .

Id. at *5. We agree.

Cases where § 1608(a)(3) service was held to be ineffective involved suits where service was sent "to a *person* other than the Minister of Foreign Affairs, not to a *place* other than the Ministry of Foreign Affairs." *Rux*, 2005 WL 2086202, at *16 (emphasis in original); *see Magness v. Russian Fed'n*, 247 F.3d 609, 613 (5th Cir. 2001) (finding service improper where complaint sent to Texas Secretary of State for forwarding to Boris Yeltsin, and also sent directly to Russian Deputy Minister of Culture); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 153-54 (D.C. Cir. 1994) (finding service improper when made on "the Bolivian Ambassador and Consul General in Washington, and

the Bolivian First Minister and the Bolivian Air Force in La Paz[,] but never [on] the Ministry of Foreign Affairs or the Secretary of State"); *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983) (holding that the Ambassador of Nicaragua cannot be construed as the head of the ministry of foreign affairs).

The legislative record on § 1608(a)(3) is sparse, and sheds little light on the question. The 1976 House Judiciary Committee Report seemed to contemplate – and reject – service on an embassy in its discussion of proposed methods of service under the FSIA:

> A second means [of service], of questionable validity, involves the mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state. Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention on Diplomatic Relations, 23 UST 3227, TIAS 7502 (1972), which entered into force in the United States on December 13, 1972. Service on an embassy by mail would be precluded under this bill. *See* 71 Dept. of State Bull. 458-59 (1974).

H.R. Rep. No. 94-1487, at 26 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6625. This report, though, fails to make the distinction at issue in the instant case, between "[s]ervice *on* an embassy by mail," *id.* (emphasis added), and service on a minister of foreign affairs *via* or *care of* an embassy. The House Report suggests that § 1608 precludes service on an embassy to prevent any inconsistency with the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227 (entered into force in United States Dec. 13, 1972) [hereinafter Vienna Convention]. The relevant

sections of the Vienna Convention say only that "[t]he premises of the mission shall be inviolable," and that "[a] diplomatic agent shall . . . . enjoy immunity from [the host state's] civil and administrative jurisdiction." *Id.* arts. 22, 31. In a case where the suit is not against the embassy or diplomatic agent, but against the foreign state with service on the foreign minister *via* the embassy address, we do not see how principles of mission inviolability and diplomatic immunity are implicated. Moreover, Sudan has not sought to rely on this legislative history.

In this case, service was directed to the right individual, using the Sudanese Embassy address for transmittal. Process was not served on the foreign mission; rather, process was served on the Minister of Foreign Affairs via the foreign mission. The requirement advanced by Sudan, that service be mailed directly to a ministry of foreign affairs in the foreign country, makes little sense from a reliability perspective and as a matter of policy. While direct mailing relies on the capacity of the foreign postal service or a commercial carrier, mail addressed to an embassy – as an extension of the foreign state – can be forwarded to the minister by diplomatic pouch. *See Rux*, 2005 WL 2086202, at *16 (addressing the "inherent reliability and security associated with diplomatic pouches," which, "unlike the United States Postal Service, DHL, or any other commercial carrier, is accorded heightened protection under international law to ensure safe and uncompromised delivery of documents between countries." (citing Vienna Convention, art. 27)).

We conclude that plaintiffs complied with the plain language of the FSIA's service of process requirements at 28 U.S.C. § 1608(a)(3).

Finally, though not well developed in its brief, we construe Sudan as also raising a question as to whether service was proper in the turnover proceedings. Because we have found that service of the default judgment in the underlying D.C. District Court case was proper, Sudan's argument fails. *See* 28 U.S.C. § 1608(e) ("A copy of [the] default judgment shall be sent to the foreign state . . . in the manner prescribed for service in this section."); *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1130 (9th Cir. 2010) ("The FSIA is quite clear what a plaintiff must serve on a foreign state before a court may enforce a default judgment against that state: the default judgment. Service of post-judgment motions is not required."); *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 747-49 (7th Cir. 2007) (holding that the federal rules for service applied because the FSIA's service provisions do not cover post-judgment motions).

Here, plaintiffs served all three turnover petitions at issue, as well as their Motion for Entry of Order Finding Sufficient Time Has Passed to Seek Attachment and Execution of Defendant / Judgment Debtor's Assets, by U.S. mail addressed to Sudan's new Minister of Foreign Affairs, Ali Ahmed Karti, via the Embassy of Sudan in Washington. Service of these post-judgment motions was not governed by the heightened standards of § 1608(a), and was required to adhere only to the notice provisions of the federal rules, with which plaintiffs complied. *See* Fed. R. Civ. P. 5(a)(2) ("No service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4."); Fed. R. Civ. P. 5(b)(2)(C) ("A paper is served" by "mailing it to the person's last known address – in which event service is complete upon mailing.").

B. *Attachment of Assets Without an OFAC License or Case-Specific DOJ Statement of Interest*

Sudan contends that the District Court erred in ordering the turnover of sanctions-controlled assets without first procuring either an OFAC license or a case-specific DOJ Statement of Interest stating that no OFAC license was necessary. We disagree. The government has made its position known through previous Statements of Interest that judgment holders under the Terrorism Risk Insurance Act of 2002 (the "TRIA"), 28 U.S.C. § 1610 note, are exempt from the normal OFAC licensure requirement, and the government's position is not limited to the cases in which it filed the Statements.

Section 1605 of the FSIA creates exceptions to the general blanket immunity of foreign states from the jurisdiction of U.S. courts, including the "terrorism exception," 28 U.S.C. § 1605A, which Congress added to the FSIA in 1996 to "give American Citizens an important economic and financial weapon against . . . outlaw states" that sponsor terrorism. H.R. Rep. No. 104-383, at 62 (1995). This exception allows courts to hear claims against foreign states designated by the State Department as "state sponsor[s] of terrorism." *See Calderon-Cardona v. Bank of N.Y. Mellon*, 770 F.3d 993, 996 (2d Cir. 2014).[6]

In an effort to further aid victims of terrorism in satisfying judgments against foreign sponsors of

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[6] The State Department currently designates Iran, Sudan, and Syria as state sponsors of terrorism. Sudan has been designated as such since August 12, 1993. U.S. Dep't of State, *State Sponsors of Terrorism*, http://www.state.gov/j/ct/list/c14151.htm (last visited Sept. 22, 2015).

terrorism, Congress enacted the TRIA, the purpose of which is to "deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism in any court of competent jurisdiction by enabling them to satisfy such judgments through the attachment of blocked assets of terrorist parties." *Weininger v. Castro*, 462 F. Supp. 2d 457, 483 (S.D.N.Y. 2006) (quoting H.R. Rep. No. 107-779, at 27 (2002)). Section 201(a) of the TRIA, which governs post-judgment attachment in some terrorism cases, provides, in relevant part:

> Notwithstanding any other provision of law . . . , in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605A or 1605(a)(7) (as such section was in effect on January 27, 2008) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA § 201(a) (codified at 28 U.S.C. § 1610 note).

Sudanese assets in the United States are subject to just such a block, pursuant to sanctions that began with Executive Order 13067 in 1997 and are now administered by OFAC and codified at 31 C.F.R. Part 538. Ordinarily, unless a plaintiff obtains a license from OFAC, he is barred from attaching assets that are frozen under such sanctions regimes. *See Estate of Heiser v. Bank of Tokyo Mitsubishi UFJ, N.Y. Branch*,

919 F. Supp. 2d 411, 422 (S.D.N.Y. 2013).[7] Nonetheless, barring any contrary authority, a court will accept that no OFAC license is required on the authority of a DOJ Statement of Interest filed pursuant to 28 U.S.C. § 517. *Id.* at 423.

The question, then, is whether § 201(a) of the TRIA and § 1610(g) of the FSIA, which authorize the execution of § 1605A judgments against state sponsors of terrorism, permit a § 1605A judgment holder to attach blocked Sudanese assets without a license from OFAC. The government, in previous Statements of Interest, has answered this question in the affirmative.

In *Weininger*, plaintiffs obtained a default judgment against Cuba and sought turnover of funds blocked pursuant to the Cuban Assets Control Regulations, held by a garnishee bank. 462 F. Supp. 2d at 499. The bank petitioned for interpleader relief. In a Statement of Interest filed with the district court, the DOJ indicated that "[i]n the event the Court determines that the funds are subject to TRIA, the funds may be distributed without a license from the Office of Foreign Assets Control." *Id.* (alteration in original) (quoting DOJ Ltr., Jan. 6, 2006).

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[7] In the case of Sudan, there are two relevant provisions that forbid the attachment of blocked assets. *See* 31 C.F.R. § 538.201(a) ("Except as authorized by regulations, orders, directives, rulings, instructions, licenses, or otherwise, no property or interests in property of the Government of Sudan, that are in the United States . . . may be transferred . . . ."); 31 C.F.R. § 538.313 ("The term *transfer* means . . . the issuance, docketing, filing, or levy of or under any judgment, decree, attachment, injunction, execution, or other judicial or administrative process or order, or the service of any garnishment . . . ." (emphasis added)).

Several years later, in the D.C. District Court, the DOJ filed a Statement of Interest that, while primarily addressing a different question, took the position that "when a blocked asset comes within TRIA's scope, TRIA generally overrides OFAC's regulations requiring that a license be obtained before the asset is attached." *Estate of Heiser v. Islamic Republic of Iran*, No. 00-CV-2329, 807 F. Supp. 2d 9 (D.D.C. 2011) (Docket No. 230).

Finally, in a related case, *Bank of Tokyo*, the government yet again reiterated its position in a Statement of Interest filed with the district court. 919 F. Supp. 2d at 422-23. In *Bank of Tokyo*, petitioners were family members and the estates of seventeen Air Force servicemembers killed in the 1996 Khobar Towers bombing in Saudi Arabia, and sought to satisfy the D.C. District Court judgment against the Islamic Republic of Iran by compelling respondent banks in New York to relinquish sanctions-blocked funds. The district court held that petitioners were entitled to attachment of Iran's assets, relying in part on the letter from the U.S. Attorney's Office. The Statement of Interest explicitly noted that the DOJ had previously addressed this issue in another public filing, in *Weininger*, 462 F. Supp. 2d 457. The district court noted that it "is aware of no contrary authority that would require an OFAC license in this instance. It accepts the Statement of Interest's assertion that no OFAC license is required." *Bank of Tokyo*, 919 F. Supp. 2d at 423.

Sudan contends that unlike in *Bank of Tokyo*, the District Court in the instant case did not seek a Statement of Interest before issuing the turnover order. While it is true that the District Court did not explicitly seek a new case-specific Statement from

DOJ, it relied on the persuasive authority of the previous Statements on the issue. In the December 12, 2013, December 13, 2013, and January 6, 2014 turnover orders, the District Court wrote that "[a]n OFAC license is not necessary to disburse these funds and no notice is necessary to the Sudanese agencies and instrumentalities." J. App. at 67, 73, 78 (citing *Bank of Tokyo*, 919 F.Supp. 2d at 422; *Heiser v. Islamic Republic of Iran*, 807 F.Supp. 2d at 23; *Weininger*, 462 F.Supp. 2d 457).

Sudan points to no authority that requires a court to seek a new Statement of Interest in every case in which this issue arises. Unless or until the United States changes its position, the *Weininger* and *Heiser* Statements of Interests represent the government's clear intent to exempt TRIA judgment holders from sanctions regime OFAC licensure requirements. Because we find that the District Court properly relied on the *Weininger* and *Heiser* letters, we need not reach appellees' alternative argument for affirmance, that as a matter of law, even without recourse to a Statement of Interest, an OFAC license is unnecessary to distribute blocked assets to a TRIA judgment holder. *See, e.g.*, *Rubin v. Islamic Republic of Iran*, 709 F.3d 49, 54 (1st Cir. 2013) ("TRIA thereby allows a person to circumvent the normal process for attaching assets that are blocked under a sanctions program, which entails obtaining a license from OFAC.").

Once a district court determines that blocked assets are subject to the TRIA, those funds may be distributed without a license from OFAC. Plaintiffs in this case obtained an underlying § 1605A terrorism judgment from the D.C. District Court and properly domesticated that judgment in the Southern District of New York, asserting a right to execute against

Sudan's assets pursuant to the TRIA and 28 U.S.C. § 1610(g). The turnover orders then properly issued.

CONCLUSION

For the foregoing reasons, the orders of the district court are

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed 3/30/12]

Civil Action 10-1689 (RCL)

RICK HARRISON, et al.,

Plaintiffs,

v.

REPUBLIC OF SUDAN,

Defendant.

ORDER AND JUDGMENT

In accordance with the Memorandum Opinion issued this day, it is hereby

ORDERED that final judgment is entered in favor of plaintiffs and against defendant;

ORDERED that plaintiffs are awarded $78,676,474 in compensatory damages and $236,029,422 in punitive damages, for a total award of $314,705,896 to be distributed as follows:

	Economic	Pain and Suffering	Solatium	Punitive	Total
Aaron Toney	196,040	1,500,000	0	5,088,120	6,784,160
Carl Wingate	198,365	5,000,000	0	15,595,095	20,793,460
David Morales	248,108	2,000,000	0	6,744,324	8,992,432
Edward Love	279,613	2,000,000	0	6,838,839	9,118,452
Eric Williams	553,253	3,000,000	0	10,659,759	14,213,012
Gina Morris	562,577	1,500,000	0	6,187,731	8,250,308
Jeremy Stewart	515,627	7,500,000	0	24,046,881	32,062,508
Kesha Stidham	873,104	5,000,000	0	17,619,312	23,492,416
Margaret Lopez	52,594	7,500,000	0	22,657,782	30,210,376
Martin Songer	509,174	2,000,000	0	7,527,522	10,036,696
Rick Harrison	286,083	5,000,000	0	15,858,249	21,144,332
Robert McTureous	901,936	5,000,000	0	17,705,808	23,607,744
John Buckley III	0	7,500,000	0	22,500,000	30,000,000
Keith Lorenson	0	5,000,000	0	15,000,000	20,000,000
Rubin Smith	0	5,000,000	0	15,000,000	20,000,000
Shelly Songer	0	0	1,000,000	3,000,000	4,000,000
Lisa Lorenson	0	0	4,000,000	12,000,000	16,000,000
Andy Lopez	0	0	4,000,000	12,000,000	16,000,000

and it is further

ORDERED that plaintiffs shall, at their own cost and consistent with the requirements of 28 U.S.C. § 1608(e), send a copy of this Order and Judgment, and the Memorandum Opinion issued this date, to defendants.

SO ORDERED.

Signed by Royce C. Lamberth, Chief Judge, on March 30, 2012.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed 03/30/12]

Civil Action 10-1689 (RCL)

RICK HARRISON, et al.,
Plaintiffs,

v.

REPUBLIC OF SUDAN,
Defendant.

MEMORANDUM OPINION

This case arises out of the bombing of the U.S.S. Cole ("the Cole") on October 12, 2000. The attack ripped a thirty-two-by-thirty-six-foot hole in the side of the vessel when it was berthed in Yemen's Aden Harbor. Seventeen servicemen and women were killed, and forty-two suffered injuries. The eighteen plaintiffs before this Court are fifteen former sailors who were injured while on the Cole and three of their spouses, who, although not on the Cole during the attack, allegedly suffered emotional distress upon learning of the incident.[1] Plaintiffs bring this action under the "state-sponsored terrorism" exception to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330,

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[1] Since the filing of this lawsuit, one plaintiff, Rubin Smith, has died. After his claim was severed, his spouse, as administrator of his estate and upon motion, rejoined the case [Dkt. #34].

1602 *et seq.*[2] Plaintiffs allege that defendant Republic of Sudan ("Sudan") is liable for their injuries by virtue of its support of Al Qaeda, which perpetrated the Cole bombing. Before the Court is [Dkt # 14] plaintiffs' motion for a default judgment against Sudan. After making pertinent findings of fact, the Court concludes that plaintiffs have provided sufficient evidence to establish a cause of action against Sudan under FSIA's state-sponsored terrorism exception, that Sudan is liable to the plaintiffs for the alleged harms, and that plaintiffs are entitled to both compensatory and punitive damages. In accordance with these findings and conclusions, the Court awards damages to plaintiffs.

I. BACKGROUND

A. Prior and Current USS Cole Litigation.

Two cases involving the Cole attack relate to the case at bar and speak to the question of Sudan's liability for the Cole attack. In *Rux v. Republic of Sudan* fifty-seven survivors of the seventeen sailors who died in the Cole attack sued Sudan for damages. *Rux v. Republic of Sudan*, 2005 WL 2086202 (Aug. 26, 2005). After defaulting, Sudan moved to dismiss plaintiffs' claims on jurisdictional and immunity grounds. The district court denied Sudan's motion, concluding that plaintiffs had alleged sufficient jurisdictional facts to bring their case within the FSIA state-sponsored terrorism exception. *Id.* Sudan appealed. The United States Court of Appeals for the Fourth Circuit affirmed the district court, finding that plaintiffs' allegations

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[2] This provision which was enacted as part of the 2008 National Defense Authorization Act ("NDAA"). Pub. L. No. 110-181, § 1083, codified at 28 U.S.C. § 1605A. It creates a "federal right of action against foreign state." *Simon v. Republic of Iran*, 529 F. 3d 1187, 1190 (D.C. Cir. 2008).

met FSIA's jurisdictional pleading requirements "by describing how Sudan provided Al-Qaeda a base of operations to plan and prepare for the bombing, and provided operational support for the attack." *Rux v. Republic of Sudan*, 461 F.3d 461, 473–74 (4th Cir. 2006). The district court then proceeded to the merits of plaintiffs' claims and concluded that, even though Sudan was liable for plaintiff's injuries, plaintiffs were only entitled to damages under the Death on the High Seas Act (DOHSA), 46 U.S.C. § 30302. The Court held that "[w]hile the FSIA vests jurisdiction in federal courts to hear cases against foreign states, it does not afford plaintiffs with a substantive cause of action." 495 F. Supp. 2d 541, 555 (E.D. Va 2007). Accordingly, the district court dismissed plaintiffs' maritime and state law claims and awarded eligible plaintiffs $ 7,956,344 under DOHSA. *Id.* at 567–69. Plaintiffs appealed the district court's judgment. While this appeal was pending, Congress passed the 2008 NDAA amendment to the FSIA which, in addition to creating a federal private right of action, added punitive damages and solatium as recoverable damages in a new section of the FSIA, § 1605A. *See* 28 U.S.C. § 1605A(c). Under this provision, the same fifty-seven *Rux* plaintiffs filed a second lawsuit in August 2010, joining with two new plaintiffs to the case. *Kumar v. Republic of Sudan*, 2011 WL 4369122 (E.D. Va. Sept. 19, 2011). The same district court that heard *Rux* considered and rejected the claims of the plaintiffs to whom it had awarded judgments in the previous litigation, reasoning that both *res judicata* and the prohibition on legislative reopening of final judgments barred them. *Id.* at *10–11 (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 241 (1995)). The court therefore awarded damages only to the new plaintiffs who had not

been party to the previous *Rux* litigation. *Id.* at *11.[3] Plaintiffs in the case at bar were not plaintiffs in *Rux* or *Kumar*.

The Court underscores an important matter before proceeding: because plaintiffs in this case bring their action under the new § 1605A, they are entitled to types of damages—i.e. for pain and suffering and solatium—and punitive damages that the *Rux* plaintiffs, who initiated their action before § 1605A was enacted, did not obtain. As the Court will explain below, these new damages can amount to substantially larger sums than the *Rux* court awarded those plaintiffs. The Court regrets this disparity and emphasizes that the difference primarily reflects a change in the governing statute rather than this Court's assessment of the relative hardship endured by the *Rux* plaintiffs and the plaintiffs currently before the Court.

B. Plaintiffs' Claims Before This Court

Plaintiffs effected service of the complaint, summons, and notice of suit on Sudan by mail. *See* 28 U.S.C. § 1608(a)(3). Sudan accepted service on November 17, 2010. Return of Service/Affidavit, Nov. 23, 2010 [Dkt. # 11]. Under § 1608(d) of the FSIA, this service obligated Sudan to serve and answer or other responsive pleading within 60 days after service. 28 U.S.C.

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[3] The Court respectfully disagrees with the *Kumar* court's application of *res judicata* to bar plaintiffs' claims. For purposes of that doctrine, this Court is not persuaded that there is a meaningful distinction between the procedural posture of the *Kumar* plaintiffs and that of the plaintiffs in *In re Islamic Republic Iran Terrorism Litigation* where this Court concluded that *res judicata* did not preclude claims filed under § 1605A even though they had been litigated under § 1605(a)(7). *In re Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d 31, 84–85 (D.D.C. 2009).

§ 1608(d). It failed to do so. On January 19, 2011 plaintiffs obtained entry of default from this court. Clerk's Entry of Default, Jan. 19, 2011 [Dkt. # 13]. Plaintiffs now move for a default judgment [Dkt. # 14]. To date, Sudan has not served an answer or any other responsive pleading.

II. LEGAL STANDARDS

A. Default Judgment

The FSIA states that a court shall not enter a default judgment against a foreign state "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S. C. § 1608(e); *Roeder v. Islamic Republic of Iran*, 333 F. 3d 228, 232 (D.C. Cir. 2003). This standard mirrors that applied to entry of default judgment against the United States in Federal Rule of Civil Procedure 55(d).[4] *See Hill v. Republic of Iraq*, 328 F. 3d 680, 684 (D.C. Cir. 2003). FED. R. CIV. PROC. 55(d).

In considering motions for default judgment, a court may accept as true the plaintiffs' "uncontroverted evidence," *Wachsman v. Islamic Republic of Iran*, 603 F. Supp. 2d 148, 155 (D.D.C. 2009) including proof by affidavit. *See Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 83–85 (D.D.C. 2010). On September 21, 2011 an evidentiary hearing was held before the Honorable Henry H. Kennedy, Jr.[5] During that hear-

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[4] Rule 55(d) provides: "no default [judgment] shall be entered against the United States . . . unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." FED. R. CIV. P. 55 (d).

[5] Courts are not required to hold an evidentiary hearing, *see Bodoff v. Islamic Republic of Iran*, 424 F. Supp. 2d 74, 78 (D.D.C.

ing, the Court accepted evidence in form of depositions, affidavits, expert testimony, and original documentary evidence. Reviewing these submissions, this Court will determine whether or not the evidence is sufficiently "satisfactory" to prove Sudan's liability and the damages that plaintiffs seek. 28 U.S.C. § 1608(e).[6]

B. Jurisdiction and Immunity

To state a viable claim, plaintiffs must first demonstrate that this Court has jurisdiction to hear the claims they assert and that Sudan is not entitled to immunity from suit. The FSIA is the "sole basis of jurisdiction over foreign states in our courts." *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 39 (D.D.C. 2009). While foreign sovereigns enjoy general immunity from suit in U.S. courts, FSIA § 1605A establishes a waiver provision that is conditioned on a number of factors. Specifically, a foreign state is not immune from suits in which the following factors are met: (1) money damages are sought (2) against that state for (3) personal injury or death that (4) was "caused by" (5) an act of torture, extrajudicial killing . . . or the provision of material support of resources for such an act if such act or provision of material support or resources is engaged in by an official, employee or agent of such foreign state while acting within the scope of his or her office, employment or agency." 28 U.S.C. § 1605(A)(a)(1); *accord Owens v. Republic of Sudan*, 2011 WL 5966900, at *17 (D.D.C.

2006), but typically do so as a matter of custom and acknowledgment of the defendants' sovereign status.

[6] This case was reassigned to the undersigned judge on November 4, 2011 after Judge Kennedy's retirement. I have carefully reviewed all of the evidence presented to Judge Kennedy.

Nov. 11, 2011).[7] Because plaintiffs in this case do not allege torture or extrajudicial killing, only the "material support" provision is relevant to the case at bar. With regard to § 1605A's causation requirement, in this Circuit there must be "some reasonable connection between the act or omission of the defendant and the damages which the plaintiff has suffered." *Valore*, 700 F. Supp. 2d 52, 66 (internal quotations omitted).

Furthermore, the FSIA provides that courts "shall hear a claim" under § 1605A of the FISA if (1) the foreign state was designated as a state sponsor of terrorism at the time the act occurred; (2) the claimant was a United States national, a member of the armed forces, or otherwise an employee or contractor of the Government of the United States, acting within the scope of her employment and (3) the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim, provided that the act occurred in the foreign state against which the claim is brought. 28 U.S.C. § 1605(A)(a)(2). Combined, these § 1605A(a)(1) and (a)(2) factors determine the Court's jurisdiction over the present case and whether Sudan has effectively waived its immunity from suit. To resolve these threshold questions, the Court first makes relevant findings of fact, as discussed below.

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[7] "[T]he defendant bears the burden of proving that the plaintiff's allegations do not bring its case within a statutory exception to immunity." *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) (citing *Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1002 (D.C. Cir.1985) and *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1171 (D.C. Cir. 1994)); *Owens v. Republic of Sudan*, 412 F. Supp. 2d 99, 94 (D.D.C. 2006) (citing *Phoenix* and stating "sovereign immunity is in the nature of an affirmative defense.").

C. Cause of Action and Theory of Liability

After establishing jurisdiction, plaintiffs must also advance a theory of recovery that is supported by the evidence presented to the court. When a state is subject to suit under an exception to immunity, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." *Id.* § 1606.

Section 1605A(c) of the FSIA creates an explicit "private right of action," which, when read in concert with §1605A(a)(1), establishes the requirements for a viable claim. *Id.* §1605A(a)(1). Courts have interpreted the FSIA-created cause of action to require plaintiffs to prove a theory of liability under which defendants cause the alleged injury or death. *Valore*, 700 F. Supp. 2d at 73; *see also Rimkus v. Islamic Republic of Iran*, 750 F. Supp. 2d 163, 176 (D.D.C. 2010). Plaintiffs must supply the elements of each specific claim—in this case, assault, battery, and intentional infliction of emotional distress ("IIED"). Because the statute is silent as to these elemental requirements, courts in this district apply principles of law found in the Restatement of Torts and other leading treatises. *See, e.g.*, *Valore*, 700 F. Supp. 2d at 76; *In re Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d at 60 n.19; *Heiser v. Islamic Republic of Iran* (*Heiser II*), 659 F. Supp. 2d 20, 24 (D.D.C. 2009); *see also Bettis v. Islamic Republic of Iran* 315 F.3d 325, 333 (D.C. Cir. 2003) ("[F]ederal courts in FSIA . . . cases have accepted § 46 of the Restatement (Second) of Torts as a proxy for state common law of intentional infliction of emotional distress"). Having established the applicable law and evidentiary requirements, the Court now reviews the evidence and makes findings of fact.

III. FINDINGS OF FACT

A. Judicial Notice of Facts Found in Other Courts

As a preliminary matter, the Court must determine whether or not it will take judicial notice of findings made in *Rux*, as plaintiffs request [Dkt. #26]. As discussed above, both the district court and the Fourth Circuit concluded in that litigation that plaintiffs had alleged sufficient facts as to Sudan's material support of Al Qaeda and the Cole attack and that the country was therefore not immune from suit. *Rux*, 495 F. Supp. 2d at 554 (citing and reaffirming *Rux v. Sudan*, 461 F.3d at 467–75 (E.D. Va 2006); *Rux*, 461 F.3d at 473–74.[8] The district court then proceeded to find that, as a matter of fact, Sudan had provided such support and was liable for plaintiffs' harm. *Rux*, 495 F. Supp. 2d at 556.

Courts in this district have taken judicial notice of related FSIA proceedings and findings of fact made therein. *See, e.g.*, *Estate of Doe v Islamic Republic or Iran*, 808 F. Supp. 2d 1 (D.D.C. 2011) (taking judicial notice of facts found in *Dammarell v. Islamic Republic of Iran*, 2006 WL 2583043 (D.D.C. Sept. 7, 2006) which

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[8] Sudan appeared in these earlier proceedings. It filed a motion to dismiss, which was denied on August 26, 2005. *Rux*, 495 F. Supp. 2d at 543. On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the Eastern District of Virginia's ruling. Subsequently, counsel for Sudan notified the Eastern District that they would not defend nor participate in the proceeding on the merits. A clerk default was entered, and the matter proceeded to trial. *Id.* Counsel for Sudan attended trial but did not participate other than to make a brief closing statement regarding damages. *Id.* Based upon the evidence submitted at trial, judgment was entered against Sudan on July 25, 2007. *Id.* at 566–69.

found Iran had provided material support to Hizbollah for the attack on the U.S. Embassy in Beirut); *Brewer v. Islamic Republic of Iran*, 664 F. Supp. 2d 43 (D.D.C. 2009) (taking notice of the same for *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128, 132 (D.D.C. 2001)); *Taylor v. Islamic Republic of Iran*, 811 F. Supp. 2d 1,6–7 (D.D.C. 2011) (taking notice of facts found in *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46 (D.D.C. 2003), which found Iran provided material support for the 1984 bombing of the U.S. Marine barracks)). Indeed, "[t]he statutory obligation found in § 1608(e) was not designed to impose the onerous burden of re-litigating key facts in related cases arising out of the same terrorist attack," *Rimkus v. Republic of Iran*, 750 F. Supp. 2d 163, 172 (D.D.C. 2010). Thus, when a court has found facts relevant to a FSIA case involving material support to terrorist groups, courts in subsequent, related cases may "rely upon the evidence presented in earlier litigation . . . without necessitating the formality of having that evidence reproduced." *Taylor*, 811 F. Supp. 2d at 7.

At the same time, taking *notice* of another court's finding of fact does not necessarily denote *adoption* or *finding* of that fact. Indeed, just as "findings of fact made during this type of one-sided hearing should not be given a preclusive effect," *Weinstein v. Islamic Republic of Iran*, 175 F. Supp. 2d 13, 20 (D.D.C. 2001), they also "should not be assumed true beyond reasonable dispute." *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 58–59 (D.D.C. 2010). Moreover, because "default judgments under the FSIA require additional findings than in the case of ordinary default judgments," *Weinstein*, 175 F. Supp. 2d at 19–20, the Court "should endeavor to make such additional findings in each case." *Murphy*, 740 F. Supp. 2d at 59.

Therefore, taking judicial notice of the facts established by the *Rux* court, does not conclusively establish the facts found in *Rux* for, or the liability of the defendants in, this case. Based on this judicial notice of evidence presented in earlier, similar cases "courts may reach their own independent findings of fact." *Anderson v. Islamic Republic of Iran*, 753 F. Supp. 2d 68, 75 (D.D.C. 2010). As a result, employing this FSIA-specific approach to judicial notice-taking of prior proceedings, the Court grants plaintiffs' motion to take judicial notice of the findings of fact in *Rux* [Dkt. # 26], reviews the relevant evidence, and makes its own findings of fact and conclusions of law. Turning to the facts presented and noticed, the Court finds the following:

1. The USS Cole Bombing[9]

At approximately 8:30 a.m. on October 12, 2000, the Cole entered the Port of Aden, Yemen, to temporarily stop for refueling. The ship began refueling at approximately 10:31 a.m. At approximately 11:10 a.m., a small boat manned by two drivers pulled up parallel to the ship. Seconds later, the boat exploded.

The explosion occurred between approximately 11:15 and 11:18 a.m., just as some of the crew was sitting down for lunch. The blast ripped a large hole in the port side of the ship, and the main engine room, auxiliary machine room, and a storeroom were flooded. Smoke, dust, and fuel vapors filled the air. Several chambers were structurally destroyed. As discussed

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[9] This section is based on a Navy report cited in *Rux*: Investigation to Inquire Into the Actions of USS Cole (DDG 67) In Preparing For And Undertaking a Brief Stop For Fuel at Bandar at Tawahi (Aden Harbor) Aden, Yemen, On Or About 12 October 2000. *See Rux*, 495 F. Supp. 2d at 544 n.12 (citing report). The report describes the attack and its aftermath, and the Court summarizes relevant portions here.

above, the blast and its after-effects killed seventeen navy sailors, and forty-two others were injured.

2. Sudan's Support of the USS Cole Bombing[10]

a. Sudan and Al Qaeda

Since 1993, the United States has designated Sudan as a state sponsor of terrorism. 58 Fed. Reg. 52523-01 (Oct. 8, 1993); U.S. Department of State, State Sponsors of Terrorism, available at http://www.state.gov/j/ct/c14151.htm (last visited March 22, 2012). During the 1990s, Hassan Abdallah Turabi, head of the Sudanese political party and leader of the Muslim Brotherhood and the National Islamic Front ("NIF"), transformed Sudan into a centralized, Islamic state that supported movements and organizations with militant Islamic ideologies. Exs. 80 at 12 & 81 at 18-19.

As is well-known today, Al Qaeda is a worldwide terrorist network. Ex. 81 at 29:4-7. Founded by Osama Bin Laden in approximately 1990, Ex. 22, it has organized, executed or inspired acts of terrorism around the world that killed or injured thousands of innocent people, including the September 11, 2001 attacks on the United States. Exs. 28 & 74 at 70.

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[10] In determining whether Sudan provided material support and assistance to Al Qaeda in perpetrating the attack on the Cole, the Court accepts the deposition testimony from three experts including: Lorenzo Vidino, a Research Program Manager at the Jebsen Center for Counter-Terrorism Studies at The Fletcher School of Tufts University, Ex. 78; James Woolsey, the director of the Central Intelligence Agency from 1993 to 1995, Ex. 79; and Steve Emerson, Executive Director of The Investigative Project on Terrorism and an expert on Islamic extremist networks. Ex. 77. The Court accepts each as an expert witness on terrorism, the relationship between Al Qaeda and Sudan, and the material support Sudan provided to Al Qaeda for the Cole bombing.

According to the U.S. State Department, Bin Laden relocated to Sudan from Afghanistan in 1991, where he was welcomed by Turabi. Ex. 17. Turabi and Bin Laden shared a common extremist ideological and religious outlook. Bin Laden agreed to help Turabi in the regime's ongoing war against African Christian separatists in southern Sudan, and also to invest his wealth in the poor country's infrastructure. Exs. 81 at 21–23 & 74 at 57. In exchange, Sudan provided Bin Laden's fledgling terrorist group with a sanctuary within which it could freely meet, organize, and train militants for operations. Ex. 80 at 13:3–14:7. In 1996, he was expelled from the country under international pressure and returned to Afghanistan. Exs. 23 & 74 at 57, 109. Both before and after this departure, the effects of Sudan's support of Al Qaeda were substantial.

b. Joint Business Ventures

Bin Laden established several joint business ventures with the Sudanese regime that began to flourish upon his arrival in the Sudanese capital of Khartoum in 1991. Ex. 17. Bin Laden formed symbiotic business relationships with wealthy NIF members by undertaking civil infrastructure development projects on the regime's behalf. *Id.* These included Al-Hijrah for Construction and Development, Ltd., which built the Tahaddi road between Khartoum and Port Sudan on the Red Sea coast, as well as a modern international airport near Port Sudan; Wadi al-Aqiq Company, Ltd., which, dealt in gum, corn, sunflower, and sesame products; and Al-Themar al-Mubarak-ah Agriculture Company, Ltd., which acquired large tracts of land near Khartoum and in eastern Sudan. Exs. 17 & 32 at 239, 241. These businesses provided income to Al

Qaeda, as well as cover for the procurement of explosives, weapons, and technical equipment, and for the travel of Al Qaeda operatives. Exs. 24 & 74 at 57–58. Bin Laden continued to maintain his substantial business interests and facilities in Sudan even after his departure to Afghanistan in 1996. Exs. 23 & 82 at 26-27.

c. Banking Support

Sudan allowed its banking institutions to be used by Al Qaeda to launder money. Ex. 81 at 25. Indeed, Bin Laden and wealthy members of the NIF capitalized Al-Shamal Islamic Bank in Khartoum; Bin Laden personally invested $50 million in the bank. Exs. 17 & 32 at 332. In the late 1980s, Sudan adopted an Islamic banking system that forbids interest and lacks the rigorous accounting standards used by Western banking systems. Ex. 81 at 36. The lack of scrutiny associated with this system was ideal for Al Qaeda because it allowed the group to move large sums of money in support of its operations without detection. Exs. 81 at 52 & 80 at 15. Douglas Farah, former reporter for the Washington Post in West Africa and author of the book "Blood From Stones: The Secret Financial Network of Terror," Ex. 76, asserted in a written deposition, that Sudan "provided [Al Qaeda] fundamentally with a banking structure, Islamic structure that's out of the norm of the banking rules that we're acquainted with in the west, and allowed them channels to move money through that would be virtually undiscoverable to the outside world." Ex. 80 at 14-15, 26. He further stated that Al Qaeda "couldn't have operated with that degree of freedom and openness if they had not been sanctioned by the central government to do so." *Id.*

d. Training and Direct Finance of Terrorist Groups

Starting in the early 1990s, Turabi and the Sudanese regime convened annual conferences in Sudan under the label Popular Arab and Islamic Conference. Ex. 80 at 26:13–27:15; Ex. 82 at 19:16-20:22. At these conferences, Bin Laden and other top leaders and operatives from the most violent Islamic terrorist organizations congregated to exchange information and plan terrorist activities. Exs. 74 at 61 & 81 at 26. Although the conference was closed down in approximately 2000, Sudan continued to be used as a safe haven by Al Qaeda and other terrorist groups. Ex. 35.

In addition, as reported by the U.S. Department of State in its annual "Patterns of Global Terrorism" reports, the Sudanese military cooperated with Bin Laden and Al Qaeda to finance at least three terrorist training camps in northern Sudan. Ex. 17. As well, each year from 1997 through 2000, Sudan served as a meeting place, safe haven, and training hub for Al Qaeda and other terrorist groups including Lebanese Hizballah, Palestinian Islamic Jihad, Abu Nidal Organization, and Hamas. *See* Exs. 22; 25; 28; 35. Most of the groups maintained offices and other forms of representation in the capital, using Sudan primarily as a secure base for organizing terrorist operations and assisting compatriots elsewhere." Exs. 25 & 28. Moreover, Ayman Al-Zawahiri, a top-ranking member of Al Qaeda, reached an agreement in 1998 with Sudan's national Islamic groups to establish budgets to finance terror operations. Ex. 81 at 43:9–44:4. Bin Laden's construction company worked directly with Sudanese military officials to transport and provision the camps, where terrorists of Egyptian, Algerian, Tunisian, and Palestinian origin received training. *Id.*

Sudan's support of Al Qaeda continued after Bin Laden's 1996 departure until at least the Cole bombing. Ex. 80 at 12:11–23. As of 1999, this assistance consisted of "paramilitary training, money, religious indoctrination, travel, documents, safe passage, and refuge." As of 2000 support "included the provision of travel documentation, safe passage, and refuge." Ex. 28.

e. Diplomatic Cover

As early as 1998, Sudan provided Al Qaeda members with Sudanese diplomatic passports, diplomatic pouches, and regular Sudanese travel documentation that facilitated the movement of Al Qaeda operatives in and out of the country. Exs. 22, 25, 35, 53, 81 at 31; 83 at 28. Diplomatic passports allow the holder to pass through airport security in airports and ports around the world without her bags being checked and without the same level of scrutiny or searches normally given to regular passport holders. Exs. 80 at 17; 81 at 32. A diplomatic passport typically lasts between five and ten years. Ex. 81 at 33. Thus, the passports issued in 1998 would not have expired prior to 2003. *See id.* Diplomatic pouches enjoy diplomatic immunity from search or seizure. Al Qaeda agents with these passports and pouches were therefore able to enter and leave Sudan and cross borders in other countries carrying materials to prepare for attacks without arousing suspicion. Exs. 82 at 19; 81 at 33; 83 at 31; 80 at 14. Indeed, it was critical to Al Qaeda's method of training its operatives in one country and then dispatching them with their materials to other countries to carry out operations or await instructions. Ex. 83 at 25:5–26:5; Ex. 83 at 31:9–32:1. By providing such cover to Al Qaeda, Sudan enabled the terrorist organization to transport weapons and munitions outside

the country and into other countries undetected by customs agents. Exs. 82 at 25; 80 at 18.

f. Sudan's Connection to the Cole Attack

While receiving support from Sudan, Al Qaeda prepared the strike against the Cole. The attack was part of a decade-long plan conceived and executed by Bin Laden and Al Qaeda to confront U.S. interests in the Middle East. Ex. 72 at 29. Bin Laden supervised the Cole plot directly. Ex. 74 at 190. As stated in the 9/11 Commission Report, Bin Laden "chose the target and location of the attack, selected the suicide operatives, and provided the money needed to purchase explosives and equipment." *Id.* Mr. Emerson and Mr. Vidino both testified that the attack's "mastermind" was Qaed Salim Sinan al-Harethi, also known as Ali Qaed Sinan Harthi, who was one of Bin Laden's bodyguards. Exs. 81 at 45–46; 83 at 33. They further assert that Al-Harethi was trained by Al Qaeda in Sudan in the 1990s before being dispatched to Yemen where, according to Mr. Vidino, he became "the chief of operation[s] of Al Qaeda in Yemen." Ex. 81 at 46.

In addition to training, Sudan was "more likely than not" the source of the explosives used in the Cole bombing, according to CIA Director Woolsey. Ex. 82 at 46. Mr. Emerson testified, "I have no doubt the source [of the explosives used on the Cole] came from Al Qaeda and was transported to Yemen from Al Qaeda or by the Sudanese government through most probably the diplomatic pouch." Ex. 80 at 18–19. Mr. Farah testified that his "best guess" as to the source of the explosives used in the Cole, based on his "studied opinion and having discussed this case with intelligence officials," is Sudan, "which was the closest place to Yemen in which they had the safe quarter in which to be able to move this type of goods across the border."

Ex. 80 at 18–19. As well, according to Mr. Emerson, the explosives used in the Cole attack were sent by Al Qaeda operatives in Sudan. Ex. 83 at 25:20–26:5. In criminal proceedings arising out of the 1998 embassy bombings, one of Bin Laden's lieutenants in Sudan, Jamal Al-Fadl, corroborated this fact when he testified against Bin Laden. Ex. 32, *U.S. v. Bin Laden*, 397 F. Supp. 2d 465 (S.D.N.Y 2005), Case No. 98-cr-1023, Trial Tr. Feb. 6, 2001. Specifically, Mr. Al-Fadl stated under oath that he worked under Bin Laden in Sudan; that he stored four crates of weapons and explosives at a farm in Sudan owned by Bin Laden; and that he shipped the four crates in an Al Qaeda-owned boat from a facility owned by the Sudanese military in Port Sudan to Yemen, where they were to be used to "fight the Communists." Ex. 32 at 262, 336–40.

In sum, the evidence suggests that Sudan provided Al Qaeda with the support, guidance, and resources that allowed it to transform into a sophisticated, terrorist network, and that such support was critical to Al Qaeda developing the expertise, networks, military training, munitions, and financial resources necessary to plan and carry out the Cole attack. Ex. 83 at 25:5–28:14. As Mr. Woolsey testified, "[t]he proximity of Sudan to Yemen, the need for a protected logistics infrastructure, the confused situation in the Government of Yemen at the time . . . , the amount of explosives that needed to be put in the boat that attacked the Cole, all that suggests to me that the logistical support and base of operations that could have been available in Sudan could have been of substantial assistance to an attack in Yemen, such as the one that occurred." Ex. 82 at 29. He summarized: the Cole attack "might have been possible, but it would not have been as easy" without Sudan's support. *Id.* In addition, Mr. Vidino stated that the bombing would

have been "close to impossible" without Sudan's assistance because "simply all they needed, starting from the training to the explosives, to all what a terrorist cell needs, even the ideological aspect of it, came from Sudan. It was clearly necessary to have all these things in place to carry out an operation such as the attack on the Cole." Ex. 81 at 47–48. In addition, Mr. Emerson asserted that the Cole attack would not have occurred without Sudan. Ex. 157 at 34. According to Emerson, by removing Sudan's support, "[y]ou would have deprived them of the oxygen needed to operate." *Id.* Moreover, Mr. Farah testified that he did not think the bombing of the Cole could have happened "without the active support of the Government of Sudan . . . from 1992 through the Cole bombing, Sudan provided an incredibly necessary and vital infrastructure for Al-Qaeda to be able to prepare and move the explosives and carry out the attacks on the Cole. And it was not clandestine or hidden presence, but rather fairly overt and knowing presence by senior members of the NIF government in Sudan." Ex. 80 at 14, 27–30.

In light of the submitted reports, testimony, and other uncontroverted evidence, the Court finds that Sudan provided material support to Al Qaeda such that the terrorist organization could attack the Cole. The conforms to the findings of the *Rux* court, discussed above. With this fact established, the Court now turns to the uncontested evidence plaintiffs have submitted on the nature and extent of their injuries.

B. Plaintiffs' Injuries

1. Plaintiffs on the Cole During the Attack

Plaintiffs who were on the Cole during the attack, each allege assault, battery and IIED. They claim injuries in the form of post-traumatic stress, lost

physical abilities, and anguish, and they seek compensatory and punitive damages. Each individual's claim is explained in more detail below.

Rick Harrison

Rick Harrison was born on January 30, 1962, in Cut Bank, Montana. Ex. 92 at 6:24-7:6. On January 19, 1982, Mr. Harrison enlisted in the Navy. Ex. 92 at 7:15-17. He intended to remain in the Navy as a career. Ex. 92 at 7:23-8:17. In July 1999, he was assigned to serve on the Cole as a fire marshal. Ex. 92 at 8:20-24.

At the time of the bombing, Mr. Harrison was on the starboard side of the ship walking past the medical station. Ex. 92 at 15:10-17. He was located approximately 47 feet from the blast. Ex. 92 at 16:13-24. The blast threw him toward the overhead, causing him to strike his head and suffer a concussion. Ex. 92 at 17:14-18:1. Mr. Harrison landed directly on his knees causing severe injuries to his knees, back. The blast also damaged the membranes in his ears. Ex. 92 at 17:14-18:1, 18:22-20:1. Mr. Harrison inhaled toxic smoke in a room where wiring was burning. Ex. 92 at 22:21-23:10. He later developed a lung condition as a result of breathing the toxic smoke. *Id.* Mr. Harrison did not cease his rescue activities for 96 hours. Ex. 92 at 20:15-18, 23:17-24:10.

Upon returning to Naval Station in Norfolk, Virginia, Mr. Harrison's permanent injuries were discovered when he was unable to pass a physical readiness test. Ex. 92 at 24:17-25:15. Mr. Harrison was subsequently diagnosed with the compression of ten lower vertebrae, flattened arches in his feet, damage to the tympanic membrane in his right ear, a separated shoulder and damage to his rotary cuff, and a severe

concussion. Ex. 92 at 19:9-20:1, 25:2-15, 28:13-24. Aside from the physical injuries, he also had recurring nightmares, mood swings, and severe headaches. Ex. 92 at 25:16-25. Ultimately, as a result of his physical and emotional condition, he was medically discharged from the Navy. Ex. 92 at 26:19-27:4. Currently, Mr. Harrison endures constant physical pain in his knees, shoulders, lower back, and feet. Ex. 92 at 28:8-29:7. Mr. Harrison testified that the emotional impact of these injuries is still present today. Ex. 92 at 29:8-31:16. His symptoms include anxiety, anger, flashbacks, and nightmares. Ex. 92 at 31:17-32:23.

Dr. Hernandez-Cardenache an expert clinical psychologist, further provided his expert opinion that Mr. Harrison's symptoms are consistent with chronic post-traumatic stress disorder. Ex. 106 at 36:14-39:4.

Keith Lorensen

Keith Lorensen was born on September 28, 1967, in St. Paul, Minnesota. Ex. 90 at 5:13-16. On October 7, 1985, Mr. Lorensen enlisted in the Navy. Ex. 90 at 6:8-25. He intended to remain in the Navy as his career. Ex. 90 at 12:12-18. In 1998, Mr. Lorensen was assigned to the Cole. Ex. 90 at 14:12-17.

At the time of the attack, Mr. Lorensen was in the chief petty officer's mess, midship on the port side very near to the point of impact, conversing with another crew member. Ex. 90 at 14:24-16:6. The blast flung him 30 feet through the air and caused him to black out. Ex. 90 at 16:7-18:8. When he regained consciousness, he found himself lying across the mess underneath debris from the galley equipment. *Id.* His right femur was broken four inches above the knee and had been completely folded behind his back so that his foot was now located near his head. Ex. 90 at 19:6-20:14.

Mr. Lorensen also sustained multiple contusions on each of his legs, a lip laceration, and a broken wrist in the blast. Ex. 90 at 18:15-20:25, 30:13-31:9. After noticing bleeding from his right leg, he used his belt as a tourniquet to stop the bleeding from his femoral artery, and continued applying the pressure until, after approximately 40 minutes, he was removed from the space by other sailors. Ex. 90 at 18:9-20:14.

After being removed from the mess hall, Mr. Lorensen was given morphine and taken to the top of the ship with other injured sailors. Ex. 90 at 22:18-23:4. While waiting for additional medical treatment, Mr. Lorensen witnessed a fellow sailor being declared dead. Ex. 90 at 23:5-15. He was then taken to a hospital in Yemen for further treatment. Ex. 90 at 27:11-18. He blacked out again in the hospital and only regained consciousness after surgery had been performed on his broken leg. Ex. 90 at 29:1-6. When he awoke, his leg was in traction, with makeshift metal components affixed to open wounds in his leg held in place by a piece of concrete attached via twine as a counterweight. Ex. 90 at 30:13-31:16. The laceration in his lip was subsequently stitched without any anesthesia. *Id.*

The next day he was flown to Germany where he received further medical treatment before ultimately returning to Virginia. Ex. 90 at 32:13-21. After returning to the United States, seven months passed before he could put any weight on his right leg. Ex. 90 at 40:10-41:16. He can no longer squat down and has lost range of motion in his right leg. Ex. 90 at 43: 21-44:7. In addition to physical injuries, Mr. Lorensen also sustained psychological damage as a direct result of the incident. Ex. 90 at 46:1-4. Specifically, he experienced increased irritability and could not sleep through the night for a number of years. Ex. 90 at 46:5-

48:17. Mr. Lorensen also experienced flashbacks and emotional outbursts. *Id.* He was subsequently diagnosed with post traumatic stress disorder. Ex. 90 at 46:1-17. The Department of Veterans Affairs has assigned him a 40% disability rating. Ex. 90 at 60:16-61:1.

Dr. Rene Hernandez-Cardenache provided his expert opinion that Mr. Lorensen's symptoms are consistent with chronic post-traumatic stress disorder. Ex. 106 at 74:6-79:21.

John Buckley III

John Buckley III was born on August 10, 1979. Ex. 99 at 4:18-21. He enlisted in the Navy on May 28, 1997, Ex. 99 at 5:7-8, intending to remain in the service for the duration of his career. Ex. 99 at 5:15-21. Prior to the terrorist attack, he had been serving on the Cole for approximately three years. Ex. 99 at 6:18-21.

At the time of the bombing, Mr. Buckley was in a passageway approximately ten feet from the point of impact. Ex. 99 at 12:25-13:3. The explosion flung him through the air to the other end of the passageway, where he had a concussion and lost consciousness. Ex. 99 at 13:4-18. After coming to, Mr. Buckley moved toward the area of the blast in an effort to assist injured sailors. Ex. 99 at 13:22-14:17. Mr. Buckley assisted in the medical care and evacuation of other injured sailors for several hours, until he collapsed due to his own injuries. *Id.*

As a result of the blast, Mr. Buckley suffered fractures to both knees, hearing loss, and severe lower back trauma. Ex. 99 at 8:25-10:13. Mr. Buckley continues to suffer from his physical injuries. Ex. 99 at 9:25-10:3. He cannot lift over 100 pounds, has undergone

two back surgeries, and continues to receive treatment for his knee injuries. *Id.*; Ex. 99 at 17:16-18:7. Mr. Buckley has also been diagnosed with post-traumatic stress disorder. Ex. 99 at 8:25-10:13. He continues to experience nightmares and headaches, is prone to aggressive behavior, and hears voices. Ex. 99 at 19:3-12. On May 29, 2001, Mr. Buckley was honorably discharged from the Navy. Ex. 99 at 7:13-25. Mr. Buckley was assigned a 100% disability rating by the VA. Ex. 99 at 8:14-21.

According to Dr. Hernandez-Cardenache, Mr. Buckley's symptoms are consistent with post-traumatic stress disorder. Ex. 106 at 21:17-25:5.

Margaret Lopez

Margaret Lopez was born on December 26, 1970. Ex. 96 at 6:14-16. She enlisted in the Navy. Ex. 96 at 7:6-7. It was Mrs. Lopez's intention to remain in the Navy as a career. Ex. 96 at 7:10-16. In July 1998, Mrs. Lopez was assigned to the Cole as a gas turbine systems mechanic. Ex. 96 at 10:23-11:8.

At the time of the bombing, Mrs. Lopez was supervising work being performed in the oil lab. Ex. 96 at 14:12-22. The bomb blast impacted the ship approximately 20 feet from her location and immediately killed one of the sailors working with her in the oil lab at that time. Ex. 96 at 15:21-16:13. As a direct result of the blast, Mrs. Lopez sustained burns to her face, neck, legs, and arms; her ear drums were ruptured; and several discs in her spine were ruptured. Ex. 96 at 19:25-20:13. After the blast, the oil lab began to fill with smoke and water. Ex. 96 at 16:25-17:14, 18:8-18. In order to escape the area, she freed herself from debris and jumped into the sea through the hole created by the blast. Ex. 96 at 18:20-25. She remained

in the water for over an hour before being pulled to safety. Ex. 96 at 21:8-19.

Mrs. Lopez was transferred to a hospital in Yemen before being sent to Germany for further treatment. Ex. 96 at 23:15-24:7. She remained in Germany for two weeks under the care of a burn specialist. Ex. 96 at 24:11-18. While waiting to get a skin graft, Mrs. Lopez developed pneumonia. Ex. 96 at 24:19-25:1. It took approximately two years for her burns to fully heal. Ex. 96 at 25:25-26:15. Mrs. Lopez also underwent an eardrum replacement surgery. *Id.* Since the bombing, Mrs. Lopez has experienced insomnia, mood swings and nightmares, and has been diagnosed with post-traumatic stress disorder. Ex. 96 at 34:5-20; 29:9-30:7.

As a result of her medical condition, Mrs. Lopez retired from the Navy on November 4, 2004. Ex. 96 at 27:3-28:1. At the time, she was prescribed antidepressants and pain medication for her injuries. Ex. 96 at 29:9-30:7. Based upon her injuries, she has been assigned a 100% disability rating by the Department of Veterans Affairs. Ex. 96 at 30:25-31:15.

Dr. Rene Hernandez-Cardenache testified that Mrs. Lopez's symptoms are consistent with chronic post-traumatic stress disorder. Ex. 106 at 59:6-61:25.

Edward Love

Edward Love was born on October 4, 1979. Ex. 94 at 5:16-19. He enlisted in the Navy on March 30, 2000, Ex. 94 at 6:4-5, intending to spend his career in the Navy. Ex. 94 at 17:22-25. His first assignment was onboard the Cole, which began in approximately August 2000. Ex. 94 at 6:8-10.

When the attack occurred, Mr. Love was midship on the port side. Ex. 94 at 8:12-14. As a result of the blast,

he was thrown to the ground and suffered a ruptured eardrum. Ex. 94 at 8:22-9:8. Mr. Love immediately began to assist the injured crew and to repair damage to the ship to prevent further flooding. Ex. 94 at 9:17-10:25. In doing so, he witnessed many sailors who were severely injured or had died because of the attack. *Id.*

After three or four hours, Mr. Love left the ship and was transferred to the hospital in Yemen. Ex. 94 at 10-21. The next day, Mr. Love was moved to Germany where he received further treatment. Ex. 94 at 14:2-12. Since that day, Mr. Love has not been able to pass a hearing test for his right ear. Ex. 94 at 14:13-19. The VA has assigned a 10% disability rating for this injury. Ex. 94 at 14:20-24. After returning to the United States, Mr. Love was stationed at a naval base in Norfolk, Virginia. Ex. 94 at 16:16-25.

While stationed in Norfolk, Mr. Love was diagnosed with post traumatic stress disorder. Ex. 94 at 17:2-9. The lasting effects from the bombing have caused Mr. Love's personality to change, with symptoms including problems with anxiety, mood swings, lack of appetite, and trouble sleeping. Ex. 94 at 18:18-23. As a result of these continuing issues, on March 3, 2003, he was discharged from the Navy. Ex. 94 at 17:10-21. Mr. Love continues to receive treatment for his symptoms to this day. Ex. 94 at 19:14-20:25.

According to Dr. Hernandez-Cardenache, Mr. Love's symptoms are consistent with chronic post-traumatic stress disorder and co-morbid mood disorder. Ex. 106 at 62:1-65:4.

Robert McTureous

Robert McTureous, born on May 25, 1972, Ex. 89 at 5:13-16, enlisted in the Navy. Ex. 89 at 5:23-24. It was his intention to have a career in the Navy. Ex. 89 at 5:25-6:5. In August 2000, Mr. McTureous joined the crew of the Cole. Ex. 89 at 9:11-24.

On the day of the attack, Mr. McTureous was in the oil lab, with Margaret Lopez, preparing to relieve other sailors who were involved in the refueling process. Ex. 89 at 13:2-14. The blast occurred in close proximity to the oil lab, and the room began to fill with water. Ex. 89 at 13:20-15:8. Because the exit door of the oil lab had been damaged by the blast, Mr. McTureous escaped by climbing through the wreckage and jumping through the hole in the ship that had been caused by the explosion. *Id.*; Ex. 89 at 16:3-16.

After being rescued from the water by his shipmates, Mr. McTureous was taken to a hospital in Yemen where he remained overnight until being transferred to Germany and then Portsmouth Naval Hospital for further treatment. Ex. 89 at 18:5-19:13. After the bombing, Mr. McTureous was discharged from the Navy because he could not face "the reality of going back to sea." Ex. 89 at 23:18-24:4.

As a result of the blast, Mr. McTureous sustained severe, permanent, painful, life long injuries including two ruptured eardrums, second degree burns on his face, a fractured finger and shrapnel in his arms. Ex. 89 at 15:5-8, 20:4-13, 24:5-25:11. Currently, Mr. McTureous has significant hearing loss in both ears. Ex. 89 at 25:8-11. Due to his physical injuries, the Department of Veterans Affairs has assigned him a 70% disability rating. Ex. 89 at 25:12-15, 39:14-40:6.

In addition to severe physical injuries, Mr. McTureous was diagnosed with post-traumatic stress disorder in 2002. Ex. 89 at 26:21-29:5. The psychological effect of the blast has caused Mr. McTureous to suffer from flashbacks, nightmares, and a fear of crowds. *Id.*; Ex. 89 at 30:8-37:15. Prior to the bombing, Mr. McTureous was outgoing, but now describes himself as reserved, scared, on edge, and shy. Ex. 89 at 27:16-22.

Dr. Rene Hernandez-Cardenache testified that Mr. McTureous' symptoms are consistent with chronic post-traumatic stress disorder and reduced cognitive functioning as a result of the attack. Ex. 106 at 25:6-28:1.

David Morales

David Morales was born on February 19, 1978 and enlisted in the Navy in July 1999. Ex. 93 at 6:8-12. It was his intention to remain in the Navy for his career. Ex. 93 at 6:20-25. After graduating from basic training, Mr. Morales was assigned to the Cole as a boatswain's mate. Ex. 93 at 6:16-25.

On the day of the bombing, Mr. Morales had just finished his morning duties and had gone to his room to rest. Ex. 93 at 14:17-15:1. He was lying in his rack approximately 30 feet from the point of impact when he felt the explosion rock the ship. Ex. 93 at 15:10-25. The force of the blast caused him to impact the ceiling above his rack and then fall to the floor. *Id.* He immediately went to the top of the ship to assist his injured shipmates, encountering many severely injured and dead sailors on his way. Ex. 93 at 16:3-25:21. In the rescue efforts, Mr. Morales attempted to perform CPR on a fellow sailor who ultimately died. *Id.* Mr. Morales was later commanded to stand

security on the deck, which he did for the next three days. *Id.*

As a result of the blast, Mr. Morales suffered whiplash in his neck. Ex. 93 at 26:8-27:4. Three weeks after the incident he was diagnosed with post-traumatic stress disorder, and continues be treated for this condition to this day. Ex. 93 at 28:6-29:18, 33:5-8. Mr. Morales' symptoms include irritability, nervousness and anxiety, and flashbacks. Ex. 93 at 36:8-39:5. His condition caused Mr. Morales to be discharged from the Navy in 2002. Ex. 93 at 10:19-22, 11:18-24.

Dr. Rene Hernandez-Cardenache provided his expert opinion that Mr. Morales's symptoms are consistent with post-traumatic stress disorder. Ex. 106 at 33:14-36:13.

Gina Morris

Gina Morris was born on October 15, 1980. Ex. 88 at 3:22-25. She enlisted in the Navy in 1998. Ex. 88 at 4:13-18. She intended to remain in the Navy for her career. Ex. 88 at 4:24-5:1. The Cole was her first assignment. Ex. 88 at 5:15-17.

At the time of the attack, Ms. Morris was on the inside of the ship moving towards the oil lab. Ex. 88 at 7:22-8:2. Immediately upon hearing the explosion, she went toward the oil lab to help her shipmates who had been injured in the blast. Ex. 88 at 7:22-10:9. For over five hours, Ms. Morris assisted in the medical treatment of sailors injured in the blast. *Id.* Ms. Morris then left the ship to escort injured sailors to a hospital in Yemen. *Id.*

Although she did not sustain any physical injuries, Ms. Morris has suffered severe emotional distress as a direct result of the attack. Ex. 88 at 10:10-19:22. Upon

going to the aid of her shipmates, Ms. Morris witnessed the horrific aftermath of the bombing. Ex. 88 at 8:24-10:9. Ms. Morris left the Navy, in August 2001, as a direct result of the attack. Ex. 88 at 23:1-11. She is currently undergoing treatment for her ongoing symptoms including anger, sleep issues, high anxiety, flashbacks and guilt. Ex. 88 at 10:10-19:22.

Dr. Hernandez-Cardenache testified that Ms. Morris' symptoms are consistent with post-traumatic stress disorder. Ex. 106 at 65:5-67:24.

Rubin Smith

Rubin Smith was born on July 26, 1979, in Albemarle, North Carolina. Deposition of Tracey Smith, ("D.E. 36"), Supplemental Proposed Findings of Fact ("Supp. Ex. 1") at 6:21-7:3. In 1997, Mr. Smith enlisted in the Navy. D.E. 36, Supp. Ex. 1 at 7:16-18. Mr. Smith loved his experience in the Navy and only left the Navy because of the trauma he experienced in the bombing of the U.S.S. Cole. Supp. Ex.1 at 14:2-22.

In October 2000, Mr. Smith was serving onboard the U.S.S. Cole as an operations specialist. D.E. 36, Supp. Ex. 1 at 8:1-13. At the time of the bombing, Mr. Smith was assigned to work in the ship's galley, which was near the epicenter of the blast. D.E. 36, Supp. Ex. 1 at 10:1-16. However, a shipmate, who was a close friend, volunteered to take his shift. *Id.* Mr. Smith's friend was in the galley as Mr. Smith's replacement at the time of the explosion and was killed. *Id.* Mr. Smith was in his quarters at the time and was thrown from his bunk to the deck by the force of the blast. The fall caused him to dislocate his ankle and suffer a torn tendon and nerve damage in his lower leg. D.E. 36, Supp. Ex. 1 at 11:20-25. As a result of his injuries, Mr. Smith was evacuated from the ship to a military

treatment facility. D.E. 36, Supp. Ex. 1 at 11:3-8. Mr. Smith suffered scarring as a result of his injuries and received treatment for ongoing pain up until the time of his death. D.E. 36, Supp. Ex. 1 at 11:9-10 and 22; 13:19-23.

As a result of the blast, Mr. Smith suffered severe emotional distress, which caused him to develop post-traumatic stress disorder. D.E. 36, Supp. Ex. 1 at 12:1-13. For the rest of his life, Mr. Smith was plagued by feelings of guilt over the death of the shipmate who had volunteered to take his shift in the galley and other friends who were also lost onboard. D.E. 36, Supp. Ex. 1 at 10:10-16. His symptoms, which included depression and anger, resulted in problems with maintaining personal relationships. D.E. 36, Supp. Ex. 1 at 14:9-15; 16:10-18. In 2003, Mr. Smith, who believed that he was no longer emotionally capable of serving, was discharged from the Navy. D.E. 36, Supp. Ex. 1 at 14:9-15; 7:19-21.

Mr. Smith was diagnosed with post-traumatic stress disorder and was receiving psychological treatment at the time of his death. D.E. 36, Supp. Ex. 1 at 14:9-15; 16:10-18. As a result of his physical and mental injuries, Mr. Smith was assigned a 50% disability rating by the Department of Veterans Affairs. D.E. 36, Supplemental Ex. 2 at 2.

Martin Songer, Jr.

Martin Songer was born on August 3, 1970. Ex. 102 at 4:24-5:4. On June 11, 1991, Mr. Songer enlisted in the Navy. Ex. 102 at 6:19-22. In 1998, Mr. Songer was assigned to the Cole as a Second Class Boatswain Mate. Ex. 102 at 10:7-24. At the time of the bombing, Mr. Songer was in the boatswain workshop in the aft part of the ship on the port side, approximately 150

feet away from the area of direct impact. Ex. 102 at 17:8-23. The blast threw Mr. Songer against a bulkhead. Falling equipment bruised and lacerated him. Ex. 102 at 19:11-19. Mr. Songer witnessed many dead and severely injured shipmates. Ex. 102 at 23:16-24:3, 25:20-27:9.

These events impacted Mr. Songer emotionally. Ex. 102 at 23:16-24:3, 25:20-27:9. As a direct result of the bombing, he now suffers from anxiety and temper control issues. Ex. 102 at 34:7-12. A few months after the terrorist attack, Mr. Songer decided to leave the Navy. Ex. 102 at 34:20-35:5.

Dr. Hernandez-Cardenache further provided his expert opinion that Mr. Songer's symptoms are consistent with moderate to severe emotional distress. Ex. 106 at 71:10-73:22.

Jeremy Stewart

Jeremy Stewart was born on March 5, 1981. Ex. 95 at 5:7-10. He enlisted in the Navy on February 9, 2000. Ex. 95 at 7:21-23. It was Mr. Stewart's intention to remain in the Navy for the full duration of his career. Ex. 95 at 5:25-6:4. Two weeks after he completed basic training, Mr. Stewart was assigned to the Cole as a Hull Maintenance Technician Fireman. Ex. 95 at 7:4-20.

When the bomb exploded, Mr. Stewart was thrown to the ground and suffered a concussion, losing consciousness for five to fifteen minutes. Ex. 95 at 9:12-10:18. He was removed from the debris by other sailors, taken to the flight deck on the top of the ship, and evacuated to a hospital in Yemen. Ex. 95 at 10:25-11:2. He again lost consciousness and did not come to until approximately one week later, after having been transported to Germany. Ex. 95 at 11:3-7.

As a result of the blast, Mr. Stewart suffered multiple fractures and shattered bones in his arms and legs, a gastric rupture, internal bleeding, and shrapnel wounds. Ex. 95 at 10:19-24. His injuries caused permanent scarring on his forearms, knees, legs, and stomach. Ex. 95 at 11:8-14. He is no longer able to run and has lost range of motion in his right shoulder, and endures constant pain on a daily basis. Ex. 95 at 11:15-20, 13:5-11. As a result of the attack, Mr. Stewart also exhibits a variety of emotional symptoms, including sadness, flashbacks, nightmares, irritability, and high anxiety. Ex. 95 at 15:13-16:12, 17:21-23:8. In December 2003, the Navy discharged Mr. Stewart was discharged due to his injuries. Ex. 95 at 13:14-14:4. The Department of Veterans Affairs assigned Mr. Stewart a 60% disability rating. Ex. 95 at 11:21-24.

According to Dr. Hernandez-Cardenache, Mr. Stewart's symptoms are consistent with post-traumatic stress disorder and a traumatic brain injury. Ex. 106 at 39:7-41:25.

Kesha Stidham

Kesha Stidham was born on June 12, 1981. Ex. 100 at 4:2-5. She enlisted in the Navy in July 1999, Ex. 100 at 4:18-21, and intended to remain in the Navy for her career. Ex. 100 at 6:22-24. Ms. Stidham was assigned to the Cole on October 30, 1999. Ex. 100 at 5:20-22.

The center of the explosion was approximately 50 or 60 feet away from her location. Ex. 100 at 8:23-9:5. Several sailors standing within only a few feet of her were killed by the blast. Id. The explosion caused Ms. Stidham to be thrown back ten feet through the air. Ex. 100 at 9:6-10:3. She suffered large thigh and leg bruises, fractured ribs, burns to her neck, and deep lacerations to her cheek, jawline, chin, and right ear.

Id. She was initially treated for her injuries on the vessel. Ex. 100 at 11:24-12:19. She saw other sailors injured and lying on the deck, some covered in soot, and others screaming in pain. *Id.*

After being transported off the Cole, Ms. Stidham was taken to a hospital in Yemen. Ex. 100 at 15:8-18. Ms. Stidham received 15 stitches in her face without anesthesia. Ex. 100 at 15:19-16:24. She described the pain of the stitching as tremendous. Ex. 100 at 16:4-10. Ms. Stidham had to undergo re-stitching of the wounds on her face in Germany. Ex. 100 at 17:12-15, 18:6-19:1.

Upon returning to the U.S., Ms. Stidham was placed on leave for 30 days, then returned to service on the U.S.S. Whitney. Ex. 100 at 23:9-12, 25:23-26:5. While onboard, she suffered an anxiety attack. Ex. 100 at 26:17-27:23. She was ultimately removed from the ship, placed on limited duty and discharged from the Navy. Ex. 100 at 31:6-12, 32:24-33:24. The Department of Veterans Affairs has given her a 40% disability rating due to her injuries. Ex. 100 at 54:18-22.

Ms. Stidham received psychological treatment for her emotional distress caused by the attack and was diagnosed with post-traumatic stress disorder. Ex. 100 at 28:4-22. Her symptoms, such as anger and anxiety, have resulted in problems with maintaining personal relationships and employment. Ex. 100 at 33:20-35:1, 37:5-38:2. Ms. Stidham still experiences panic attacks on a daily basis. Ex. 100 at 42:23-43:9.

Dr. Rene Hernandez-Cardenache provided his expert opinion that Stidham's symptoms are consistent with chronic post-traumatic stress disorder and panic disorder as a result of the attack. Ex. 106 at 28:2-33:13.

Aaron Toney

Aaron Toney was born on March 21, 1979 and enlisted in the Navy on December 23, 1997. Ex. 105 at 7:8-10. It was Mr. Toney's intention to remain in the Navy as his career. Ex. 105 at 7:17-22. In April 1998, Mr. Toney was assigned to the Cole as a fireman recruit. Ex. 105 at 9:1-13.

At the time of the bombing, Mr. Toney had just been relieved from his post in the engine room when he heard a loud explosion. Ex. 105 at 13:2-10. Mr. Toney immediately changed into his firefighting ensemble. Ex. 105 at 13:11-14:15. As he moved around the ship, he witnessed severely injured and dead sailors. *Id.* For 72 hours, Mr. Toney was involved in the medical care of his fellow shipmates. Ex. 105 at 17:22-20:8. Mr. Toney also assisted in repairing the damage to the ship for three weeks after the incident, and was among the last of the crewmembers to leave the vessel. Ex. 105 at 20:20-21:9.

Although Mr. Toney was not physically injured in the bombing, he has been diagnosed with post traumatic stress disorder. Ex. 105 at 23:18-24:23. His symptoms include difficulty sleeping, nightmares, memory problems, anxiety, and feelings of emptiness and distrust. Ex. 105 at 30:4-22, 36:16-37:21, 40:2-41:21, 44:11-48:17, 49:21-58:25. These symptoms ultimately caused him to leave the Navy. Ex. 105 at 28:18-29:14. He has been assigned a 30% disability rating by the Department of Veterans Affairs. Ex. 105 at 61:19-62:12.

Eric Williams

Eric Williams was born on November 12, 1980. Ex. 98 at 4:13-15. On June 16, 1999, he enlisted in the Navy. Ex. 98 at 5:3-6. It was Mr. Williams' intention

to remain in the Navy as his career. Ex. 98 at 7:14-22. In 2000, Mr. Williams was assigned to the Cole as a Tomahawk technician. Ex. 98 at 8:13-9:13. His duties included maintenance and operation of the Tomahawk missile system. *Id.*

At the time of the bombing, Mr. Williams was eating in the mess hall, in the center of the ship. Ex. 98 at 9:25-11:13. The explosion occurred directly adjacent to his location. *Id.* Shrapnel from the explosion lacerated the top of his head, which caused him to suffer a concussion and drift in and out of consciousness. *Id.* After the explosion, he witnessed sailors die from their injuries and others who had been severely injured. Ex. 98 at 18:3-23. Mr. Williams was able to move to the top of the ship, and assisted in the treatment and evacuation of other injured sailors until he again fell unconscious. Ex. 98 at 21:7-22:6. Mr. Williams was then removed to a hospital in Yemen where he received stitches for the wound to his head. Ex. 98 at 23:3-12. In the U.S., he was diagnosed with a severe concussion. Ex. 98 at 29:20-24, 33:4-9. To this day, Mr. Williams has trouble remembering events from his childhood. Ex. 98 at 33:10-23. The bombing continues to have a profound effect on Mr. Williams. Mr. Williams has been diagnosed with severe post-traumatic stress disorder and has experienced nightmares, extreme anger, and issues maintaining relationships, symptoms which he did not experience prior to the bombing. Ex. 98 at 69:13-75:21. For several years, he struggled with alcohol abuse. Ex. 98 at 35:13-36:13, 40:15-44:4, 46:2-48:2, 50:1-51:16, 54:13-56:19, 67:1-24.

Dr. Hernandez-Cardenache provided expert opinion that Mr. Williams' symptoms are consistent with chronic post-traumatic stress disorder and anxiety disorder. Ex. 106 at 42:5-50:7.

Carl Wingate

Carl Wingate was born on April 15, 1979. He enlisted in the Navy in August 31, 1998, Ex. 101 at 7:7-9, 8:20-24, intending to stay in the Navy for the remainder of his career. Ex. 101 at 7:10-17.

At the time of the bombing, Mr. Wingate was in his rack. Ex. 101 at 10:16-23. The impact of the blast caused him to be thrown from his rack and land on his head and shoulder. *Id.* Shortly thereafter, he made his way to the top of the ship and began assisting in the medical treatment of sailors injured in the blast and the transport of injured sailors from the ship to mainland. Ex. 101 at 10:24-12:13. Mr. Wingate provided medical attention to eleven injured sailors, two of which died. *Id.* One of the sailors who died was his bunkmate. *Id.*

As a result of the bombing, Mr. Wingate suffered impingement of both shoulders, herniated discs in his back, hearing loss, memory loss, and post-traumatic stress disorder. Ex. 101 at 13:8-21. Since the bombing, the physical effects of Mr. Wingate's injuries have become progressively more severe. Ex. 101 at 14:1-16:16. He continues to experience significant pain in his shoulders, neck, and back, and his range of motion is limited. *Id.* Post-traumatic stress disorder symptoms include irritability, anxiety, flashbacks, and nightmares. Ex. 101 at 30:11-33:1, 33:19-37:6. The emotional damage from the bombing has caused his personal relationships to suffer and led to a divorce from his wife. Ex. 101 at 21:7-22:3. In 2007, Mr. Wingate was discharged from the Navy as a result of the injuries he sustained from the bombing. Ex. 101 at 19:16-25, 20:21-21:6. The Department of Veterans Affairs assigned him a 60% disability rating. Ex. 101 at 19:2-5.

According to Dr. Hernandez-Cardenache, Mr. Wingate's symptoms are consistent with post-traumatic stress disorder. Ex. 106 at 50:8-55:5.

2. Plaintiffs Who are Spouses of Plaintiffs on the Cole During the Attack

Spouses of the injured sailors allege IIED and injury in the form of mental anguish and loss of consortium. They seek punitive and compensatory damages, including loss of solatium. Their claims include the following individualized injuries.

Andy Lopez

Andy Lopez is the spouse of Margaret Lopez, Ex. 97 at 5:2-6, and a former Navy master chief. Ex. 97 at 5:7-11. He married Margaret Lopez on November 8, 1996. Ex. 97 at 6:19-20. Mr. and Mrs. Lopez have two children together. Ex. 97 at 7:9-14.

On the day of the bombing, Mr. Lopez learned of the attack on the Cole from the morning news. Ex. 97 at 8:6-15. At noon that day, the Navy officially informed him of the incident and asked him to proceed to a local naval base for further information. Ex. 97 at 8:16-18. Mr. Lopez did not learn that his wife survived the blast until the next day when he spoke with her on the telephone. Ex. 97 at 9:3-19. Mr. Lopez immediately flew to meet her in Germany, where she was being treated under the care of a burn specialist. Ex. 97 at 9:23-10:4. When he arrived, Mrs. Lopez was in a medically–induced coma. He stayed there with her until her return to the United States. Ex. 97 at 10:13-11:8, 12:4-21.

The bombing and resultant injuries to his wife have affected Mr. Lopez psychologically. Ex. 97 at 17:14-18:22. Indeed, he has been diagnosed with post-

traumatic stress disorder and has entered into counseling. Ex. 97 at 18:23-19:19. Dr. Hernandez-Cardenache, testifies that Mr. Lopez's symptoms are consistent with chronic post-traumatic stress disorder. Ex. 106 at 55:15-59:5.

Lisa Lorensen

Lisa Lorensen is the spouse of Keith Lorensen, a sailor who was injured during the bombing of the Cole. Ex. 91 at 6:12-13. She was married to Mr. Lorensen on October 23, 1993. Ex. 91 at 6:14-15. The Lorensens have two children together. Ex. 91 at 6:16-20. Although Mrs. Lorensen was not enlisted in the Navy, she served as the Ombudsman of the Cole, serving as a liaison between the families and the commanding officer of a ship. Ex. 91 at 6:21-23.

On the day of the bombing, Mrs. Lorensen received a phone call advising her that something significant had occurred on the ship. Ex. 91 at 11:3-12:11. However, no specific details were provided. *Id.* She was advised to proceed to a naval facility in order to obtain more information. *Id.* While on her way to the location, Ms. Lorensen received a phone call from her mother advising her that the Cole had been attacked. *Id.* While waiting at the facility, Ms. Lorensen witnessed the Naval officers present at the location advising sailors' family members of the death or injuries suffered by their relatives. *Id.* After approximately twelve hours, she was advised that Keith Lorensen was alive, but injured. Ex. 91 at 13:19-14:15:5.

Approximately 24 hours later, Mrs. Lorensen had the opportunity to speak with her husband. Ex. 91 at 15:6-21. Mr. Lorensen told her that he did not know whether he would be able to walk again, but would be coming home. Ex. 91 at 15:19-16:4. Mrs. Lorensen

then flew to Germany to see her husband. Ex. 91 at 16:5-14. When they returned to Virginia, Mrs. Lorensen had tremendous feelings of guilt and sadness as a result of her husband's injuries and the death and injury of the other sailors on the vessel. *Id.* The emotional impact of the events caused a strain in their marriage. Ex. 91 at 20:9-21:15.

Dr. Rene Hernandez-Cardenache, an expert clinical psychologist, further provided his expert opinion that Mrs. Lorensen suffered from acute emotional distress as a direct result of the bombing. Ex. 106 at 79:22-82:3.

Shelly Songer

Shelly Songer is the spouse of plaintiff Martin Songer, who was injured during the bombing of the Cole. Ex. 103 at 5:7-9. Mrs. Songer learned of the bombing through a telephone call from her mother-in-law. Ex. 103 at 8:23-9:2. Twelve hours later, she learned that her husband survived the bombing. Ex. 103 at 9:6-15. Upon returning home, the continuing emotional effect of the terrorist attack on Mr. Songer has adversely affected their marriage. Ex. 103 at 13:4-15:16.

Dr. Hernandez-Cardenache testifies that Ms. Songer's symptoms are consistent with severe emotional distress. Ex. 106 at 67:25-71:9.

IV. CONCLUSIONS OF LAW

A. Jurisdiction is Proper and Sudan Is Not Immune from Suit

The Court finds that the plaintiffs have met FSIA's multi-factor test for jurisdiction and waiver of immunity discussed above, as set forth above. *See* 28 U.S.C. § 1605(A)(a)(1); *Owens*, 2011 WL 5966900, at *17. First, the sole remedy plaintiffs seeks is "money

damages." 28 U.S.C. § 1605(A)(a)(1). Second, Sudan is a foreign state. *Id.* Third, the evidence presented to the Court establishes that plaintiffs suffered physical injury form the attack. *Id.* Fourth, the evidence presented shows that Sudan aided Al Qaeda in executing the bombing, and this harm was a direct result of Sudan's of provision of material support. *Id.* On the evidence presented, there is "some reasonable connection between the act or omission of the defendant and the damages which the plaintiff has suffered." *Valore*, 700 F. Supp. 2d at 66 (internal quotations omitted).

As well, FSIA section 1605A(a)(2) requirements have been met. Sudan has been designated a state sponsor of terrorism since 1993, and claimants are all U.S. nationals, both statutory requirements. 28 U.S.C. § 1605A(a)(2).[11] Thus, for purposes of this action, FSIA does not protect Sudan with immunity from suit, and this Court has jurisdiction over plaintiffs' claims.

B. Plaintiffs Have Established a Cause of Action and Theory of Liability

The same facts as to material support and causation support plaintiffs' cause of action and theory of liability. Plaintiffs have shown that Sudan's support of Al Qaeda has a "reasonable connection" to the damages they suffered. *Id.* As described in detail below, they also demonstrate the other elements of the torts they allege. *See Murphy*, 740 F. Supp. 2d at 72. In keeping with the prevailing approach in this Circuit, *see id.*;

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[11] As for the § 1605A(a)(2)(A)(iii) arbitration requirement, plaintiffs were not required to extend an offer to arbitrate because the FSIA only requires as much when the alleged terrorist act occurred in the foreign state against which the claim is brought. *Id.* Even though the attack did not take place in Sudan, the plaintiffs sent Sudan an offer, to which it did not respond. *See* Notice of Amended Offer to Arbitrate, Oct. 11, 2010 [Dkt. # 6].

Bettis, 315 F.3d at 333, the Court apply the generally accepted principles of tort law. The Court addresses first the claims of the sailors who were on the Cole at the time of the attack and then the claims of their spouses who were not present during the attack.

1. Harm to Plaintiffs Injured on the Cole

a. Assault

Sudan is liable to plaintiffs for the assault they allege if, when it provided material support to Al Qaeda, (1) it acted "intending to cause a harmful contact with . . . , or an imminent apprehension of such a contact" by, those attacked and (2) those attacked were "thereby put in such imminent apprehension." RESTATEMENT (SECOND) OF TORTS § 21(1); *accord Murphy*, 740 F. Supp. 2d at 73 (citing *Valore*, 700 F. Supp. 2d at 76). Here, the record shows that Sudan acted with intent to cause harmful contact and the immediate apprehension thereof: acts of terrorism are, by their very nature, intended to harm and to terrify by instilling fear of further harm. Accepting these plaintiffs' uncontroverted assertions that they did, in fact, fear such harm because of the attack, the Court concludes that Sudan is liable for assault.

b. Battery

Likewise, Sudan is liable for battery. It acted "intending to cause a harmful or offensive contact with . . . , or an imminent apprehension of such a contact" by, those attacked and (2) "a harmful contact with" those attacked "directly or indirectly result[ed]." RESTATEMENT (SECOND) OF TORTS § 13; *accord Murphy*, 740 F. Supp. 2d at 74 (citing *Valore*, 700 F. Supp. 2d at 76). Harmful contact is that which results in "any physical impairment of the condition of another's body, or physical pain or illness." RESTATEMENT (SECOND) OF TORTS

§ 15. Accepting plaintiffs' uncontroverted assertions that they did, in fact, suffer physical injury from the attack on the Cole, the Court concludes Sudan is liable to certain plaintiffs for battery.

c. Intentional Infliction of Emotional Distress

Sudan is liable for IIED if it (1) "by extreme and outrageous conduct" (2) "intentionally or recklessly" (3) "causes severe emotional distress to another." RESTATEMENT (SECOND) OF TORTS § 46(1). Further, "if bodily harm to the other results from it, for such bodily harm." *Id.* Here, plaintiff-sailors have proven each element. In the FSIA-terrorism context, courts have held that "[a]cts of terrorism are by their very definition extreme and outrageous and intended to cause the highest degree of emotional distress." *Belkin v. Islamic Republic of Iran*, 667 F. Supp. 2d 8, 22 (D.D.C. 2009) (citing *Stethem v. Islamic Republic of Iran*, 201 F. Supp. 2d 78, 89 (D.D.C. 2002)). Based on the evidence presented, the Court concludes that Sudan's support of the Cole bombing was both intentional and reckless and caused plaintiffs emotional distress. It is therefore liable to plaintiffs for IIED.

2. Harm to Spouses of Sailors

Spouses of injured sailors have brought IIED claims, alleging that extreme and outrageous conduct directed at their spouses caused these plaintiffs severe emotional distress. According to the second Restatement of Torts, Sudan is liable in these cases under such claims if it (1) engaged in extreme and outrageous conduct (2) which was directed at persons other than plaintiffs (3) which intentionally or recklessly caused severe emotional distress, but not necessarily bodily harm, (4) to such persons' immediate family members—the immediate-family requirement—who were present

at the time such conduct occurred-the presence requirement. *Valore*, 700 F. Supp. 2d at 78 (citing RESTATEMENT (SECOND) OF TORTS § 46(1)–(2)(a)). As the record shows, plaintiff-spouses have proven the first three elements. Although the fourth element appears to prohibit recovery for emotional injury by those not present at the time such conduct occurs, the drafters of the Restatement include a caveat that this Court has interpreted liberally: "'[i]f the defendants' conduct is sufficiently outrageous and intended to inflict severe emotional harm upon a person which is not present, no essential reason of logic or policy prevents liability.'" *Heiser II*, 659 F. Supp. 2d at 27 (quoting DAN B. DOBBS, THE LAW OF TORTS § 307, at 834 (2000)). As the Court noted in *Heisler II*, "[t]errorism, unique among the types of tortious activities in both its extreme methods and aims, passes this test easily." *Id.*; *accord Brewer*, 664 F. Supp. 2d at 47. Therefore, plaintiff-spouses need not have been present at the time of a terrorist attack to recover for severe emotional injuries suffered as a result. Here, accepting the uncontroverted evidence that the plaintiffs named above suffered severe emotional and physical injury as a result of the injuries suffered by their spouses, the Court concludes that Sudan is liable to them for IIED.[12]

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[12] Plaintiffs' also alleged "loss of solatium." Such a claim under the FSIA-terrorism exception is indistinguishable from an IIED claim. *Valore*, 700 F. Supp. 2d at 85 (citing *Heiser II*, 659 F. Supp. 2d at 27 n. 4); *Beer v. Islamic Republic of Iran*, 574 F. Supp. 2d. 1, 13 (D.D.C. 2008). Therefore the Court only considers the IIED claim and awards appropriate damages (also known at "solatium damages") below.

D. Damages

Plaintiffs have stated claims and seek recovery for assault, battery, IIED, and loss of solatium. Section 1605A(c)(4) of the FSIA provides that damages available under the FSIA-created cause of action may "include economic damages, solatium, pain and suffering, and punitive damages." Accordingly, those who survived the Cole attack can recover damages for their pain and suffering, as well as any other economic losses caused by their injuries; family members can recover solatium damages for their emotional injury; and all plaintiffs can recover punitive damages.

"To obtain damages against defendants in an FSIA action, the plaintiff must prove that the consequences of the defendants' conduct were 'reasonably certain (i.e., more likely than not) to occur, and must prove the amount of the damages by a reasonable estimate consistent with this [Circuit's] application of the American rule on damages.'" *Valore*, 700 F. Supp. 2d at 84(citing, *Salazar*, 370 F. Supp. 2d at 115-16); *accord Hill v. Republic of Iraq*, 328 F.3d 680, 681 (D.C. Cir 2003). As discussed above, plaintiffs have demonstrated that Sudan's provision of material support to Al Qaeda was reasonably certain to—and indeed intended to—cause injury to plaintiffs. The Court now estimates the differing amounts of damages sought under the FSIA-created cause of action, based in part on the expert report that plaintiffs submitted as well the framework established by this Court in similar FSIA terrorism cases.

1. Economic Damages

The plaintiffs presented evidence of their lost earning capacity through the testimony and expert reports

of Dana Kaufman, JD, CPA, CFE, a forensic accounting expert accepted by the Court. *See* Ex. 107. Mr. Kaufman's reports provide calculations for the lost earnings of each of the plaintiff-sailors injured in the terrorist attack on the Cole. *Id.* Mr. Kaufman's methodology assumed that each sailor would complete a twenty-year career in the Navy and then retire. Ex. 107 at 29:25-30:22. He did not add any additional lost wages that may have occurred after retirement from the Navy. Ex. 107 at 19:11-20:13. After calculating what each sailor would have earned in the Navy, he subtracted their prospective retirement benefits to reach his conclusion. *Id.* The Court finds that this conservative approach is acceptable. Based upon his calculations, two of the sailors injured in the bombing, Keith Lorensen and John Buckley III, did not suffer any lost earning capacity. Ex. 107 at 26:21-27:11, 25:5-16. Having reviewed Dr. Kaufmans' testimony and reports, the Court finds that the plaintiffs are entitled to receive compensatory damages for the total economic damages. The precise amounts are set forth in the judgment accompanying this opinion.

2. Sailor-Plaintiffs' Pain and Suffering

In addition to economic damages, plaintiffs may be entitled to compensation for the pain and suffering they experienced as a direct result of the Cole bombing. "Damages for surviving victims [of a terrorist attack] are determined based upon an assessment of such factors as 'the severity of the pain immediately following the injury, the length of hospitalization, and the extent of the impairment that will remain with the victim for the rest of his or her life.'" *Valore*, 700 F. Supp. 2d at 83–84 (citing *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 51 (D.D.C. 2007)). "'In awarding pain and suffering damages, the Court

must take pains to ensure that individuals with similar injuries receive similar awards.'" *Id.* "Thus in *Peterson*, the Court granted a baseline award of $5 million to individuals suffering such physical injuries as compound fractures, severe flesh wounds, and wounds and scars from shrapnel, as well as 'lasting and severe psychological pain.'" *Id.* "The Court was willing to depart upward from this baseline to $7.5–$12 million in more severe instances of physical and psychological pain, such as where victims suffered relatively more numerous and severe injuries, were rendered quadriplegic, partially lost vision and hearing, or were mistaken for dead, as was one soldier who 'was placed in a body bag [and] buried alive in a morgue for four days until someone heard him moaning in pain.'" *Id*; *see also Estate of Bland v. Islamic Republic of Iran*, 2011 WL 6396527 (D.D.C. Dec. 21, 2011). Conversely, the Court will depart downward from the $5 million baseline, by an amount of $2-3 million, where victims suffered "minor shrapnel injuries or minor injury from small-arms fire," *Valore*, 700 F. Supp. 2d at 84. As well, when a serviceman suffers severe emotional injury without physical injury, this Court has typically awarded the victim $1.5 million. *See Valore*, 700 F. Supp. 2d at 85; *Bland*, 2011 WL 6396527 at *3. This Court finds that the baseline set forth in *Valore* is appropriate in this case and applies the upward and downward departures below.

Based upon the severity of certain injuries described above, the Court awards the baseline amount of $5 million to the following plaintiffs for their pain and suffering: Rick Harrison, Carl Wingate, Keith Lorenson, Robert McTureous, David Morales, and Rubin Smith. Following the rule on upward departure, the Court awards the following plaintiffs an upward departure to $7.5 million in damages: John Buckley,

Margaret Lopez, and Jeremy Stewart. Finally, the Court departs downward for plaintiffs whose physical injuries were not as severe. Accordingly, Eric Williams is awarded $3 million, and Edward Love and Martin Songer, whose physical injuries were relatively minor, are each awarded $2 million. *See Peterson*, 515 F. Supp. 2d at 54 (departing downward to $2 million where victim "was minimally injured" but "suffered lasting and severe psychological problems.").

Although the remaining plaintiffs, Martin Songer and Gina Morris, did not suffer direct physical injuries as a result of the bombing, they have suffered psychological harm. A downward departure from the baseline of $5 million is also appropriate for these plaintiffs. In accordance with this Court's awards in other cases where plaintiffs on the scene of the attack did not suffer physical harm, Ms. Morris and Mr. Toney are awarded $1.5 million each.

3. Intentional Infliction of Emotional Distress/Solatium to Spouses

In similar actions, this Court held that spouses of surviving servicemembers may be entitled to $4 million in solatium damages (or harm from IIED). *Valore*, 700 F. Supp. 2d at 85 (citing *Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229, 269 (D.D.C. 2006) and referring to the amounts it establishes for solatium damages as a "framework"); *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 52; *cf. Acosta v. Islamic Republic of Iran*, 574 F. Supp. 2d 15, 29 (D.D.C. 2008) ("In determining the appropriate award of damages for solatium, the Court may look to prior decisions awarding damages for intentional infliction of emotional distress as well as to decisions regarding solatium."). This amount is "not set in stone," however, *see Valore*, 700 F. Supp. 2d at 86, and the

Court may adjust it as it sees fit. In *Bland*, for example, this Court held that it is inappropriate for the solatium awards of family members to exceed the pain and suffering awards of the surviving servicemen. *Bland*, 2011 WL 6396527 at *5 ("[T]he Court does not think it appropriate for the . . . spouse to recover more than the victim"). In light of these holdings, the Court applies the baseline amount to the claims of Lisa Lorenson and Andy Lopez (whose spouses are awarded $5 and 7.5 million, respecitvely, for their pain and suffering) and awards them $4 million for the harm they suffered upon learning of the Cole attack and the injuries of their spouses and for the psychological harm they continue to experience as a result of the incident. The Court further finds that downward adjustment is warranted for the solatium damages of Shelly Songer because her spouse, Martin Songer, was awarded $2 million for his pain and suffering. Following *Bland*, the Court awards Mrs. Songer $1 million.

4. Punitive Damages

Having established the compensatory damage awards, the Court now determines whether, and to what extent, it should levy punitive damages against Sudan. Under 28 U.S.C. § 1605A, foreign state sponsors of terrorism may be liable for such damages. *See* 28 U.S.C. § 1605A(c). According to the Second Restatement of Torts, punitive damages are designed to both "punish [a defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." RESTATEMENT (SECOND) OF TORTS § 908(1) (1977). Further, they "may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." *Id.* Here, the Court finds Sudan's acts

sufficiently outrageous to justify punitive damages. While Sudan's support of Al Qaeda does not rise to level of direct involvement in the attacks, it was nonetheless intentional, material and, as a result, reprehensible. *See Baker*, 775 F. Supp. 2d at 85 (finding that the character of defendant's actions in providing material support and sponsorship to terrorist organization merited award of punitive damages).

In determining the proper punitive award, courts typically consider four factors: "(1) the character of the defendants' act, (2) the nature and extent of harm to the plaintiffs that the defendants caused or intended to cause, (3) the need for deterrence, and (4) the wealth of the defendants." *Flatow*, 999 F. Supp. at 32 (citing RESTATEMENT (SECOND) OF TORTS § 908(1)–(2) (1965)). Synthesizing these factors, courts in similar cases have generated two numbers that, together, determine the punitive damages award: (1) the multiplicand and (2) the multiplier (the factor by which the multiplicand should be multiplied to yield the desired deterrent effect). Depending on the evidence available, the multiplicand is either the magnitude of defendant's annual expenditures on terrorist activities, *see Valore*, 700 F. Supp. 2d at 87–88, or the amount of compensatory damages already awarded, *see Bland*, 2011 WL 6396527, at *6 (using compensatory damages as the multiplicand and 3.44 as the multiplier, based on a ratio set forth in earlier cases). Here, plaintiffs have not presented evidence relating to Sudan's actual expenditures on terrorist activities.[13] The Court will

[13] Citing various publicly availably courses, plaintiffs argue that Sudan benefitted from Bin Laden and Al Qaeda's capital and infrastructure investments, submitting figures on Sudan's gross domestic product, the growth thereof, and annual revenue from oil. After reviewing these figures, the Court concludes that these figures do not indicate what level of punitive damages that would

thus use the compensatory damages value as the multiplicand.

The multiplier has ranged between three and, in exceptional cases, five. *See Haim v. Islamic Republic of Iran*, 784 F. Supp. 2d 1, 13 (D.D.C. 2011); *Valore*, 700 F. Supp. 2d at 88–89. The Court finds no exceptional circumstances here. Contrary to plaintiffs' assertion, Sudan's brief and cursory participation in the *Rux* litigation does not suggest that, at this point in time, its government is more amenable to a deterrent signal from this Court. Therefore, the Court awards plaintiffs three times the compensatory damages in punitive damages, to be distributed in proportion to each plaintiff's share of the compensatory award.

5. Prejudgment Interest

Plaintiffs also request pre-judgment interest. Whether to award such interest is a question that rests within this Court's discretion, subject to equitable considerations. *See Pugh v. Socialist People's Libyan Arab Jamahiriya*, 530 F. Supp. 2d 216, 263 (D.D.C. 2008). "Courts in this Circuit have awarded prejudgment interest in cases where plaintiffs were delayed in recovering compensation for their injuries—including, specifically, where such injuries were the result of targeted attacks perpetrated by foreign defendants." *Baker v. Socialist People's Libyan Arab Jamahirya*, 775 F. Supp. 2d 48, 86 (D.D.C. 2011). The Court finds no delay here. Plaintiffs filed their claim in October 2010. As well, Sudan, having never even appeared in this case, has not prolonged the litigation. Thus, the Court does not find any equitable grounds for

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that would punish or deter Sudan from providing future support to terrorist entities. The Court therefore does not consider them in its damages calculation.

awarding pre-judgment interest. Moreover, because the Court has applied the framework in *Heiser*, to its calculation of solatium damages (as explicitly proposed by plaintiffs), prejudgment interest is not appropriate for these awards. *See Oveissi v. Islamic Republic of Iran*, 768 F. Supp. 2d 16, 30 n.12 (D.D.C. 2011) (concluding that pre-judgment interest was not warranted for solatium damages because the values set by the *Heiser* scale "represent the appropriate level of compensation, regardless of the timing of the attack.").

V. CONCLUSION

For the foregoing reasons, this Court finds Sudan liable for the injuries that plaintiffs suffered and awards damages accordingly. A separate Order and Judgment consistent with these findings shall issue this date.

Signed by Royce C. Lamberth, Chief Judge, on March 30, 2012.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[Filed 12/12/13]

Case No. 1:13-cv-03127 (AT)

RICK HARRISON, JOHN BUCKLEY III, MARGARET LOPEZ, ANDY LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARDS LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, MARTIN SONGER, JR., SHELLY SONGER, JEREMY STEWARD, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE, AND TRACY SMITH, as Personal Representative of the Estate of Rubin Smith,

Plaintiffs,

vs.

THE REPUBLIC OF SUDAN,

Defendant,

vs.

MASHREQBANK PSC,

Respondent.

TURNOVER ORDER AGAINST MASHREQBANK

AND NOW, this 12th day of December, 2013, upon Plaintiffs' Petition for Turnover Order Against Mashreqbank pursuant to 28 U.S.C. § 1610(g), CPLR § 5225(b) and Federal Rule of Civil Procedure 69(a), the Motion is GRANTED. The Court hereby finds and orders as follows:

1. Plaintiffs obtained a judgment in the District Court for the District of Columbia in the amount of $314,705,896, plus interest (the "Judgment"), and the entire principal amount of the Judgment remains unsatisfied.

2. Funds held at Mashreqbank are subject to execution and attachment under the Foreign Sovereign Immunities Act because the owners of the funds are agencies and instrumentalities of the Republic of Sudan.

3. [redacted], also known as [redacted], is an agency and instrumentality of the Sudanese government. The following account, totaling [redacted], plus accrued interest, is subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	Account Owner	Description	Value
[redacted]	[redacted]	[redacted]	[redacted]

4. [redacted] is an agency and instrumentality of the Sudanese government. The following account, totaling [redacted] plus accrued interest, are subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	Account Owner	Description	Value
[redacted]	[redacted]	[redacted]	[redacted]

5. [redacted] is an agency and instrumentality of the Sudanese government. The following account, totaling [redacted] plus accrued interest, execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	Account Owner	Description	Value
[redacted]	[redacted]	[redacted]	[redacted]

6. [redacted], also known as [redacted], is an agency and instrumentality of Sudan. The following account, totaling [redacted], plus accrued interest, is subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	Account Owner	Blocking Date	Value
[redacted]	[redacted]	[redacted]	[redacted]

7. The Court hereby directs Mashreqbank to turn over the proceeds of the foregoing accounts, totaling [redacted] (the "Turnover Assets"), together with any accrued interest, to the Plaintiffs within ten (10) days from the date of this Order.

8. An OFAC license is not necessary to disburse these funds and no notice is necessary to the Sudanese agencies and instrumentalities. *See Heiser v. Bank of Tokyo Mitsubishi UFJ, New York Branch*, 919 F. Supp. 2d 411, 422 (S.D.N.Y. 2013); *Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 23 (D.D.C. 2011); *Weininger v. Castro*, 432 F. Supp. 2d 457 (S.D.N.Y. 2006).

9. Upon turnover by Mashreqbank of the Turnover Assets to the Plaintiffs, plus all accrued interest thereon to date, Mashreqbank shall be fully discharged pursuant to CPLR §§ 5209 or 6204 and Rule 22 of the Federal Rules of Civil Procedure, as applicable, and released from any and all liability

and obligations or other liabilities, including all writs of execution, notices of pending action, restraining notices and other judgment creditor process of any kind, whether served on, or delivered to Mashreqbank, to the extent that they apply, purport to apply or attach to the Turnover Assets, to defendant Sudan, and to any agency and instrumentality of Sudan, or to any other party otherwise entitled to claim the Turnover Assets (in whole or in part), including without limitation, the plaintiffs in *Owens, et al. v. Republic of Sudan, et al.*, 1:01-cv-02244-JDB (D.D.C.), and any other persons or entities, to the full extent of such amounts so held and deposited in compliance with this partial judgment. Mashreqbank shall provide a copy of this order to counsel for Owens within 5 days of the date of this order.

10. Upon payment and turnover by Mashreqbank of the Turnover Assets to the Plaintiffs, plus all accrued interest thereon to date, all other persons and entities shall be permanently restrained and enjoined from instituting or prosecuting any claim, or pursuing any action against Mashreqbank in any jurisdiction or tribunal arising from or relating to any claim (whether legal or equitable) to the funds turned over in compliance with paragraph 7 of this Order.

11. This Order enforces a duly registered District Court judgment from the District of Columbia, recognized by a New York Federal Court and given full faith and credit by this Court.

So ordered,

/s/ Analisa Torres
ANALISA TORRES
United States District Judge

Date: December 12, 2013

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[Filed: 12/13/13]

Case No. 1:13-cv-03127 (AT)

RICK HARRISON, JOHN BUCKLEY III, MARGARET LOPEZ, ANDY LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARDS LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, MARTIN SONGER, JR., SHELLY SONGER, JEREMY STEWARD, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE, AND TRACY SMITH, as Personal Representative of the Estate of Rubin Smith,

Plaintiffs,

vs.

THE REPUBLIC OF SUDAN,

Defendant,

vs.

BNP PARIBAS,

Respondent.

AMENDED TURNOVER ORDER AGAINST BNP PARIBAS
REDACTED PURSUANT TO PROTECTIVE ORDER

AND NOW, this 13th day of December, 2013, upon Plaintiffs' Petition for Turnover Order Against BNP Paribas pursuant to 28 U.S.C. § 1610(g), CPLR § 5225(b) and Federal Rule of Civil Procedure 69(a), and Plaintiffs' Unopposed Motion for Order Amending

Turnover Order Against BNP Paribas, the Motion is GRANTED. The Court hereby finds and orders as follows:

1. Plaintiffs obtained a judgment in the District Court for the District of Columbia in the amount of $314,705,896, plus interest (the "Judgment"), and the entire principal amount of the Judgment remains unsatisfied.

2. Funds held at BNP Paribas New York Branch are subject to execution and attachment under the Foreign Sovereign Immunities Act because the owners of the funds are agencies and instrumentalities of the Republic of Sudan.

3. [redacted], also known as [redacted] is an agency and instrumentality of the Sudanese government. The following accounts, totaling [redacted], plus accrued interest, are subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	**Account Beneficiary**	**Blocking Date**	**Value** (as of June 20, 2012)
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]

4. [redacted], Sudan is an agency and instrumentality of the Sudanese government. The

following accounts, totaling [redacted], plus accrued interest, are subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	**Account Beneficiary**	**Blocking Date**	**Value** (as of June 30, 2012)
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas			
BNP Paribas			

5. [redacted] is an agency and instrumentality of the **Sudanese government. The following accounts, totaling [redacted], plus accrued interest, are subject to execution to satisfy Plaintiffs' outstanding judgment:**

Respondent Bank	**Account Beneficiary**	**Blocking Date**	**Value** (as of June 20, 2012)
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]

6. [redacted], formerly known as , is an agency and instrumentality of Sudan. The following account totaling [redacted], plus accrued interest, is subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	**Account Beneficiary**	**Blocking Date**	**Value** (as of June 20, 2012)
BNP Paribas	[redacted]	[redacted]	[redacted]

7. [redacted] is an agency and instrumentality of Sudan. The following account, totaling [redacted], execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	**Account Beneficiary**	**Blocking Date**	**Value** (as of June 20, 2012)
BNP Paribas	[redacted]	[redacted]	[redacted]

8. [redacted] is an agency and instrumentality of Sudan. The following accounts totaling [redacted], plus accrued interest, are subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	**Account Beneficiary**	**Blocking Date**	**Value** (as of June 20, 2012)
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]

9. The Court hereby directs BNP Paribas to turn over the proceeds of the foregoing accounts, totaling [redacted], (the "Turnover Assets"), together with any accrued interest, to the Plaintiffs within ten (10) days from the date of this Order.

10. An OFAC license is not necessary to disburse these funds and no notice is necessary to the Sudanese agencies and instrumentalities. *See Heiser v. Bank of Tokyo Mitsubishi UFJ, New York Branch*, 919 F. Supp. 2d 411, 422 (S.D.N.Y. 2013); *Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 23 (D.D.C. 2011); *Weininger v. Castro*, 432 F. Supp. 2d 457 (S.D.N.Y. 2006).

11. Upon turnover by BNP Paribas of the Turnover Assets to the Plaintiffs, plus all accrued interest thereon to date, BNP Paribas shall be fully discharged pursuant to CPLR §§ 5209 or 6204 and Rule 22 of the Federal Rules of Civil Procedure, as applicable, and released from any and all liability and obligations or other liabilities, including all writs of execution, notices of pending action, restraining notices and other judgment creditor process of any kind, whether served on, or delivered to BNP Paribas, to the extent that they apply, purport to apply or attach to the Turnover Assets, to defendant Sudan, and to any agency and instrumentality of Sudan, or to any other party otherwise entitled to claim the Turnover Assets (in whole or in part), including without limitation, the plaintiffs in *Owens, et al. v. Republic of Sudan, et al.*, 1:01-cv-02244-JDB (D.D.C.), and any other persons or entities, to the full extent of such amounts so held and deposited in compliance with this partial judgment. BNP Paribas shall provide a copy of this order to counsel for Owens within 5 days of the date of this order.

12. Upon payment and turnover by BNP Paribas of the Turnover Assets to the Plaintiffs, plus all accrued interest thereon to date, all other persons and entities shall be permanently restrained and enjoined from instituting or prosecuting any claim, or pursuing any action against BNP Paribas in any jurisdiction or tribunal arising from or relating to any claim (whether legal or equitable) to the funds turned over in compliance with paragraph 9 of this Order.

13. This Order enforces a duly registered District Court judgment from the District of Columbia, recognized by a New York Federal Court and given full faith and credit by this Court.

14. This Order supersedes any prior order relating to the Turnover Assets described in this Order.

So ordered,

/s/ Analisa Torres
ANALISA TORRES

United States District Judge

Date: December 13, 2013

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[Filed: 01/06/14]

Case No. 1:13-cv-03127 (AT)

RICK HARRISON, JOHN BUCKLEY III, MARGARET LOPEZ, ANDY LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARDS LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, MARTIN SONGER, JR., SHELLY SONGER, JEREMY STEWARD, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE, AND TRACY SMITH, as Personal Representative of the Estate of Rubin Smith,

Plaintiffs,

vs.

THE REPUBLIC OF SUDAN,

Defendant,

vs.

CREDIT AGRICOLE CORPORATE & INVESTMENT BANK,

Respondent.

~~[PROPOSED]~~ TURNOVER ORDER

WHEREAS on December 18, 2013, Plaintiffs, Rick Harrison, John Buckley III, Margaret Lopez, Andy Lopez, Keith Lorensen, Lisa Lorensen, Edwards Love, Robert McTureous, David Morales, Gina Morris, Martin Songer, Jr., Shelly Songer, Jeremy Steward, Kesha Stidham, Aaron Toney, Eric Williams, Carl

Wingate, and Tracy Smith, as Personal Representative of the Estate of Rubin Smith ("Plaintiffs"), filed their Petition for Turnover Order Against Credit Agricole Corporate and Investment Bank ("CA-CIB") pursuant to 28 U.S.C. § 1610(g), CPLR § 5225(b) and Federal Rule of Civil Procedure 69(a) ("Petition"), which is currently before the Court;

WHEREAS, Plaintiffs have provided notice to the United States Department of the Treasury's Office of Foreign Assets Control ("OFAC") of this Petition and OFAC having not appeared or otherwise objected to the relief sought in the Petition;

WHEREAS, Plaintiffs obtained a judgment in the District Court for the District of Columbia in the amount of $314,705,896, plus interest (the "Judgment"), and the entire principal amount of the Judgment remains unsatisfied; and

WHEREAS, Plaintiffs' Petition establishes that the funds described in the Petition, totaling [redacted] (as of June 29, 2012), plus accrued interest (the "Turnover Assets"), are subject to turnover pursuant to C.P.L.R. § 5225, 28 U.S.C. § 1610(g) and the Terrorism Risk Insurance Act of 2002, Pub. No. 107-297, 116 Stat. 2322 (2002), codified at 28 U.S.C. § 1610, in partial satisfaction of Plaintiffs' Judgment.

AND NOW, this 6th day of January, 2014 upon Plaintiffs' Petition, it is ORDERED, ADJUDGED AND DECREED THAT:

1. The Petition is GRANTED.

2. The Court finds that the Turnover Assets are subject to turnover pursuant to § 201 of the Terrorism Risk Insurance Act of 2002 and are subject to execution and attachment under the Foreign Sovereign

Immunities Act because the owners of the funds are agencies and instrumentalities of the Republic of Sudan.

3. [redacted] is an agency and instrumentality of the Sudanese government. The following accounts, totaling [redacted] and [redacted] (as of June 29, 2012), plus accrued interest, are subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	Originating Entity/ Originating Bank	Blocking Date	Value ($) (as of June 29, 2012
CA-CIB	[redacted]	[redacted]	[redacted]
CA-CIB	[redacted]	[redacted]	[redacted]

4. [redacted] is an agency and instrumentality of the Sudanese government. The following account, totaling [redacted] (as of June 29, 2012), plus accrued interest, is subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	Originating Entity/ Originating Bank	Blocking Date	Value ($) (as of June 29, 2012
CA-CIB	[redacted]	[redacted]	[redacted]

5. The Court hereby directs CA-CIB to turn over the Turnover Assets totaling [redacted] (as of June 29, 2012), together with accrued interest, by wire transfer to Plaintiffs' counsel, Hall, Lamb and Hall, P.A., pursuant to wire instructions to be furnished to CA-CIB by Plaintiffs, in partial satisfaction of Plaintiffs'

Judgment, within fifteen (15) days from the date of this Order.

6. Upon turnover by CA-CIB of the funds identified herein to the Plaintiffs, plus all accrued interest thereon to date, Credit Agricole shall be fully discharged pursuant to CPLR §§ 5209 or 6204 and Rule 22 of the Federal Rules of Civil Procedure, as applicable, and released from any and all liability and obligations or other liabilities in connection with the turnover of those funds, including all writs of execution, notices of pending action, restraining notices and other judgment creditor process of any kind, whether served on, or delivered to CA-CIB, to the extent that they apply, purport to apply or attach to the Turnover Assets, to defendant The Republic of Sudan, and to any agency and instrumentality of The Republic of Sudan, or to any other party otherwise entitled to claim the Turnover Asset (in whole or in part), and any other persons or entities, to the full extent of such amounts so held and deposited in compliance with this Judgment.

7. Upon payment and turnover by CA-CIB of the Turnover Assets to Plaintiffs, plus all accrued interest thereon to date, all other persons and entities shall be permanently restrained and enjoined from instituting or prosecuting any claim, or pursuing any actions against CA-CIB in any jurisdiction or tribunal arising from or relating to any claim (whether legal or equitable) to the funds turned over in compliance with paragraph 3 of this Order.

8. Plaintiffs' Information Subpoena, Interrogatories, and Restraining Notice to CA-CIB shall be vacated except with respect to the three accounts identified in paragraph 10, below.

9. An OFAC license is not necessary to disburse these funds and no notice is necessary to the Sudanese agencies and instrumentalities. *See Heiser v. Bank of Tokyo Mitsubishi UFJ, New York Branch*, 919 F. Supp. 2d 411, 422 (S.D.N.Y. 2013); *Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 23 (D.D.C. 2011); *Weininger v. Castro*, 432 F. Supp. 2d 457 (S.D.N.Y. 2006).

10. Notwithstanding anything in this Order to the contrary, Plaintiffs reserve all rights to seek turnover of the following other amounts blocked by CA-CIB pursuant to regulations promulgated by OFAC, which CA-CIB will continue to restrain:

Respondent Bank	**Originating Entity/ Originating Bank**	**Blocking Date**	**Value ($) (as of June 29, 2012**
CA-CIB	[redacted]	[redacted]	[redacted]
CA-CIB	[redacted]	[redacted]	[redacted]
CA-CIB	[redacted]	[redacted]	[redacted]

Plaintiffs and CA-CIB shall meet and confer as to these amounts following the issuance by the Second Circuit of its rulings in *Calderon-Cardona v. JPMorgan Chase Bank, N.A.*, No. 12-75 (2d Cir), and *Hausler v. JPMorgan Chase, N.A.*, Nos. 12-1264 & 12-1272 (2d Cir.).

11. This Order enforces a duly registered District Court judgment from the District of Columbia, recognized by a New York Federal Court and given full faith and credit by this Court.

So ordered,

/s/ Analisa Torres
ANALISA TORRES
United States District Judge

Date: January 6, 2014

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed 09/22/2016]

August Term 2015

(Argued: March 11, 2016
Decided: September 22, 2016)

Docket No. 14-121-cv

RICK HARRISON, JOHN BUCKLEY, III, MARGARET LOPEZ, ANDY LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, MARTIN SONGER, JR., SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE, TRACEY SMITH, as personal representative of the Estate of Rubin Smith,

Plaintiffs-Appellees,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant,

ADVANCED CHEMICAL WORKS, AKA Advanced Commercial and Chemical Works Company Limited, AKA Advanced Training and Chemical Works Company Limited, Accounts & Electronics Equipments, AKA Accounts and Electronics Equipments, et al.,

Defendants,

NATIONAL BANK OF EGYPT, CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK,

Respondents.

ON PETITION FOR REHEARING

Before: LYNCH and CHIN, *Circuit Judges*, and KORMAN, *District Judge*.*

The Republic of Sudan petitions for panel rehearing or rehearing *en banc* of this Court's decision holding that service of process on the Minister of Foreign Affairs via the Sudanese Embassy in Washington, D.C., was sufficient to meet the requirements of the Foreign Sovereign Immunities Act (the "FSIA"). The United States, as *amicus curiae*, supports the Republic of Sudan and seeks clarification on the issue of whether § 1610(g) of the FSIA overrides the requirement of a license from the Treasury Department's Office of Foreign Assets Control. The petition is DENIED to the extent it seeks panel rehearing.

ANDREW C. HALL (Roarke Maxwell, *on the brief*), Hall, Lamb and Hall, P.A., Miami, Florida, *for Plaintiffs-Appellees*.

CHRISTOPHER M. CURRAN (Nicole Erb, Claire A. DeLelle, *on the brief*), White & Case LLP, Washington, D.C., *for Defendant-Appellant*.

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* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

DAVID S. JONES, Assistant United States Attorney (Benjamin H. Torrance, Assistant United States Attorney, *on the brief*), *for* Preet Bharara, United States Attorney for the Southern District of New York, New York, New York, *for the United States of America as* Amicus Curiae.

CHIN, *Circuit Judge*:

On September 23, 2015, we affirmed three orders of the United States District Court for the Southern District of New York (Torres, *J.*) directing certain banks to turnover assets of defendant-appellant Republic of Sudan ("Sudan") to satisfy a judgment entered in favor of plaintiffs against Sudan in the United States District Court for the District of Columbia (the "D.C. District Court"), in the amount of $314,705,896. Sudan petitions for panel rehearing or rehearing *en banc*, supported by the United States of America, as *amicus curiae*.

After further briefing and argument, upon due consideration, we adhere to our decision to affirm. The petition is DENIED to the extent it seeks panel rehearing.

BACKGROUND

The facts and procedural history are set forth in our September 23, 2015 opinion, familiarity with which is assumed. *See Harrison v. Republic of Sudan*, 802 F.3d 399 (2d Cir. 2015) (the "Panel Opinion"). We summarize the background as follows:

This case arises from the bombing of the U.S.S. Cole in the port of Aden, Yemen, in 2000. Sailors and spouses of sailors injured in the explosion brought suit

against Sudan in the D.C. District Court under the FSIA, 28 U.S.C. §§ 1130, 1602 *et seq.*, alleging that al Qaeda was responsible for the attack and that Sudan had provided material support to al Qaeda.

The action was commenced in October 2010, and, at plaintiffs' request, the Clerk of the D.C. District Court served the summons and complaint on Sudan in November 2010 by mailing the papers to the Minister of Foreign Affairs of Sudan via the Sudanese Embassy in Washington, D.C. The papers were sent via registered mail, return receipt requested to:

> Republic of Sudan
> Deng Alor Koul
> Minister of Foreign Affairs
> Embassy of the Republic of Sudan
> 2210 Massachusetts Avenue NW
> Washington, DC 2008

As represented by plaintiffs, Deng Alor Koul was the Minister of Foreign Affairs of Sudan at the time.

On November 17, 2010, the Clerk of Court entered a Certificate of Mailing certifying that the summons and complaint were sent via domestic certified mail to the "head of the ministry of foreign affairs," via the Sudanese Embassy in Washington, D.C., and that the return receipt was returned to the Clerk of Court and received on November 23, 2010. No attempt was made to serve Sudan by mail to the address of the Ministry of Foreign Affairs in Khartoum, the capital. Sudan failed to serve an answer or other responsive pleading within sixty days after plaintiffs' service, *see* 28 U.S.C. § 1608(d), and the Clerk of Court thus entered a default against Sudan.

On March 30, 2012, after a hearing, the D.C. District Court (Lamberth, *J.*) entered a default judgment

against Sudan in the amount of $314,705,896, *Harrison v. Republic of Sudan*, 882 F. Supp. 2d 23, 51 (D.D.C. 2012), and found, *inter alia*, that service on Sudan had been proper, *id.* at 28. At the request of plaintiffs, on April 20, 2012, the Clerk of the Court mailed a copy of the default judgment by registered mail, return receipt requested, to Sudan's Minister of Foreign Affairs, via the Sudanese Embassy in Washington, D.C. While it does not appear that the receipt was returned, plaintiffs submitted proof that the mailing was delivered.

The judgment was thereafter registered in the Southern District of New York. In December 2013 and January 2014, the Southern District issued three turnover orders, directing certain banks to turnover assets of Sudan to plaintiffs. It was only after the last of these three turnover orders was entered that Sudan finally filed a notice of appearance, on January 13, 2014. The same day, Sudan appealed the turnover orders to this Court.[1]

In affirming the turnover orders, we held that service of process on the Minister of Foreign Affairs via the Sudanese Embassy in Washington, D.C., was sufficient to meet the requirements of the FSIA. *Harrison*, 802 F.3d at 406. We also held that the District Court did not err in issuing the turnover orders without first obtaining a license from the Treasury Department's Office of Foreign Assets Control

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[1] Nearly a year and a half later, after this appeal had been argued and while the appeal was pending, Sudan made a Rule 60(b) motion in the D.C. District Court to set aside the default judgment. Motion to Vacate Memorandum & Opinion, *Harrison v. Republic of Sudan*, No. 1:10-cv-01689-RCL (D.D.C. June 14, 2015), ECF No. 55. That court has not yet decided that motion.

("OFAC") or a Statement of Interest from the Department of Justice. *Id.* at 407.

On October 7, 2015, Sudan filed this petition for panel rehearing or rehearing *en banc*. Although it had not appeared in the earlier proceedings, the United States filed an *amicus* brief in support of the petition on November 6, 2015. After further briefing, we heard argument on March 11, 2016. We now deny the petition to the extent it seeks panel rehearing.

DISCUSSION

Sudan and the United States argue that the Panel Opinion misinterprets § 1608(a)(3) of the FSIA and puts the United States in violation of its obligations under the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227 (entered into force in United States Dec. 13, 1972) [hereinafter "Vienna Convention"]. In its reply brief, Sudan also makes the factual argument that the summons and complaint were not actually delivered to the embassy. Finally, as to the issue of the requirement of an OFAC license, the United States argues that the FSIA does not override the requirement of an OFAC license. We address each of these issues in turn.

I. *Interpretation of § 1608(a)(3)*

Sudan and the United States argue that the Panel Opinion incorrectly interprets § 1608(a)(3) of the FSIA. We acknowledge that the statutory interpretation question presents a close call, and that the language of § 1608(a)(3) is not completely clear. Nonetheless, for the reasons discussed below, we believe, as a matter of statutory construction, that the better reading of the statute favors plaintiffs' position. Accordingly, we adhere to our prior decision.

A. *The Plain Language*

The "starting point in statutory interpretation is the statute's plain meaning, if it has one." *United States v. Dauray*, 215 F.3d 257, 260 (2d Cir. 2000). Section 1608(a)(3) of the FSIA reads: "Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state . . . by sending a copy of the summons and complaint and a notice of suit . . . to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3).[2]

On its face, the statute does not specify a location where the papers are to be sent; it specifies only that the papers are to be addressed and dispatched to the head of the ministry of foreign affairs. Nothing in § 1608(a)(3) requires that the papers be mailed to a location in the foreign state, or indeed to any particular address, and nothing in the statute precluded the method chosen by plaintiffs. A mailing addressed to the minister of foreign affairs via Sudan's embassy in Washington, D.C., was consistent with the language of the statute and could reasonably be expected to result in delivery to the intended person.[3] Plaintiffs literally

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[2] As we discuss in the Panel Opinion, the FSIA provides for four methods of service. *Harrison*, 802 F.3d at 403. The method set forth in § 1608(a)(3) is the method at issue in this case.

[3] An embassy is a logical place to direct a communication intended to reach a foreign country. As explained by the United States State Department, "an embassy is the nerve center for a country's diplomatic affairs within the borders of another nation, serving as the headquarters of the chief of mission, staff and other agencies." Diplomacy 101, What Is a U.S. Embassy?, http://diplomacy.state.gov/discoverdiplomacy/diplomacy101/places/170537.htm; *see also Rux v. Republic of Sudan*, No. Civ.A. 2:04CV428, 2005 WL 2086202, at *16 (E.D. Va. Aug. 26, 2005),

complied with the statute – they sent a copy of the summons and complaint addressed to the head of the ministry of foreign affairs of Sudan.

The statute does not specify that the mailing be sent to the head of the ministry of foreign affairs *in* the foreign country. If Congress had wanted to require that the mailing be sent to the minister of foreign affairs at the principal office of the ministry in the foreign country, it could have said so – but it did not. *See Burrage v. United States*, 134 S. Ct. 881, 892 (2014) ("The role of this Court is to apply the statute as it is written—even if we think some other approach might 'accor[d] with good policy.'") (quoting *Commissioner v. Lundy*, 516 U.S. 235, 252 (1996)); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176 (1994) (rejecting argument that aiding and abetting liability existed because Congress did not use words "aid" and "abet" in statutory text and noting that "Congress knew how to impose aiding and abetting liability when it chose to do so"). In § 1608(a)(4), for example, Congress specified that the papers be mailed "to the Secretary of State *in Washington, District of Columbia*, to the attention of

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aff'd on other grounds, 461 F.3d 461 (4th Cir. 2006) (underscoring the "inherent reliability and security associated with diplomatic pouches," which, "unlike the United States Postal Service, DHL, or any other commercial carrier, is accorded heightened protection under international law to ensure safe and uncompromised delivery of documents between countries" (citing Vienna Convention, art. 27)). We do not suggest that service could be made on a minister of foreign affairs via other offices in the United States or another country maintained by the country in question, such as, *e.g.*, a consular office, the country's mission to the United Nations, or a tourism office.

the Director of Special Consular Services," for transmittal to the foreign state "through diplomatic channels." 28 U.S.C. § 1608(a)(4) (emphasis added).

The United States argues that the FSIA's service provisions require strict compliance, and that mailing the papers to "the foreign minister at a place other than the foreign ministry" is not authorized by the statute. Amicus Br. of the United States at 3. The United States argues that "[t]he most natural understanding of [the statute's] text is that the mail will be sent to the head of the ministry of foreign affairs at his or her regular place of work – *i.e.*, at the ministry of foreign affairs in the state's seat of government." *Id.* at 2. This argument is unpersuasive, as it would require us to read the words "at his or her regular place of work" or "at the state's seat of government" into the statute. *See Dean v. United States*, 556 U.S. 568, 572 (2009) (courts must "ordinarily resist reading words or elements into a statute that do not appear on its face") (quoting *Bates v. United States*, 522 U.S. 23, 29 (1997)).

The United States argues that our reading of § 1608(a)(3) is undermined by other provisions in the statute. It argues that because the FSIA permits the use of an authorized agent only in the context of service under § 1608(b)(2) – the provision that deals with service on foreign state agencies and instrumentalities – we should infer that "Congress did not intend to allow service on a foreign state via delivery to any entity that could, by analogy, be considered the foreign state's officer or agent, including the state's embassy." Amicus Br. of the United States at 3. This argument rests on the premise that the Panel Opinion requires an embassy to act as an agent of a foreign

state. We did not so hold, and, to the extent there is any doubt, we now clarify.

We do not hold that an embassy is an agent for service or a proxy for service for a foreign state. There is a significant difference between *serving process* on an embassy, and mailing papers to a country's foreign ministry *via* the embassy. Here, the summons and complaint were addressed to the Sudanese Minister of Foreign Affairs, by name and title, at the Sudanese Embassy. The embassy accepted the papers, signing for them and sending back a return receipt to the Clerk of Court.[4] The embassy could have rejected the mailing, but instead it accepted the papers and then explicitly acknowledged receipt. Accordingly, the papers were not served on the embassy as a proxy or agent for Sudan, but they were instead mailed to the Minister of Foreign Affairs, in the most natural way possible – addressed to him, by name, via Sudan's embassy.

In short, while the language of the statute is not wholly unambiguous, we believe that the better reading is that it did not require service on the foreign minister at his or her regular place of work or in the state's seat of government. Hence, service on the foreign minister via the embassy was not inconsistent with the wording of the statute.

B. *Legislative History*

We turn to the legislative history to see whether it sheds light on the statutory interpretation question

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[4] In its reply brief on its petition for rehearing, Sudan argues for the first time in this nearly six-year old litigation that in fact the embassy did not receive the papers. We discuss this issue below.

As we noted in the Panel Opinion, while the 1976 House Judiciary Committee Report makes clear that the statute does not permit service by "the mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state," see H.R. Rep. No. 94–1487, at 26 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6625, it does not address the question of mailing the papers to the minister of foreign affairs via or care of an embassy. The Report provides,

> Special note should be made of two means which are currently in use in attempting to commence litigation against a foreign state .... A second means, of questionable validity, involves the mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state. Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention on Diplomatic Relations, 23 UST 3227, TIAS 7502 (1972), which entered into force in the United States on December 13, 1972. Service on an embassy by mail would be precluded under this bill. See 71 Dept. of State Bull. 458-59 (1974).

H.R. Rep. 94–1487, at 26.

As we noted in the Panel Opinion, the report fails to make the distinction at issue in the instant case, between "[s]ervice *on* an embassy by mail," *id.* (emphasis added), and service on a minister or foreign affairs *via* or *care of* an embassy. The legislative history does not address, any more than does the statutory text, whether Congress intended to permit the mailing of service to a foreign minister via an embassy. What it does make clear, however, is that Congress was concerned about the interaction of this provision and

Article 22 of the Vienna Convention. Accordingly, we must consider the Vienna Convention, which we discuss below.

C. *Judicial Interpretation*

Before turning to the Vienna Convention, we consider the case law on the statutory interpretation issue.

As we noted in the Panel Opinion, we are not alone in our reading of § 1608(a)(3). In *Wye Oak Technology, Inc. v. Republic of Iraq*, the Eastern District of Virginia held that "Section (a)(3) does not impose a requirement that an otherwise proper service package must be delivered to a particular destination." No. 1:09cv793, 2010 WL 2613323, at *5 (E.D. Va. June 29, 2010), *aff'd on other grounds*, 666 F.3d 205 (4th Cir. 2011). There, the court held that service via an embassy is sufficient to satisfy the FSIA as long as the service is directed to the Minister of Foreign Affairs. *Id.* at *5-6. The Eastern District of Virginia also so held in *Rux v. Republic of Sudan*. 2005 WL 2086202, at *16 ("The text of § 1608(a)(3) does not prohibit service on the Minister of Foreign Affairs at an embassy address. Indeed, the statute does not prescribe the place of service, only the person to whom process must be served."). It is true, as Sudan argues, that these were district court opinions, but Sudan has not cited any case, district court or otherwise, holding that the mailing of papers addressed to the minister of foreign affairs via an embassy does *not* comply with the statute.

None of the cases relied on by Sudan or the United States undermines our reading of § 1608(a)(3). In four of the cases, the plaintiffs served the papers on the embassy or the ambassador, without addressing them

to the minister of foreign affairs. *See Barot v. Embassy of the Republic of Zambia*, 785 F.3d 26, 28-29 (D.C. Cir. 2015) (service package addressed to embassy); *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 741 (7th Cir. 2007) (no record of service but counsel submitted affidavit stating document had been served "on the embassy in Washington, D.C."); *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983) (service package addressed to ambassador); *Ellenbogen v. The Canadian Embassy*, No. Civ.A. 05-01553JDB, 2005 WL 3211428, at *2 (D.D.C. Nov. 9, 2005) (service package addressed to embassy). Consequently, those plaintiffs did not comply with the statute.

In another case, we interpreted a different provision of the FSIA, § 1608(b)(2), and held that persons entitled to diplomatic immunity are not proper agents for service under the FSIA. *Tachiona v. United States*, 386 F.3d 205, 222 (2d Cir. 2004) (holding that § 1608(b)(2) does not authorize service on foreign officials present in United States as agents for a private political party). *Tachiona* did not address the issue before us. In two other cases, the opinions do not say to whom the papers were addressed. *See Lucchino v. Foreign Countries of Brazil, S. Korea, Spain, Mexico, & Argentina*, 631 F. Supp. 821, 826 (E.D. Pa. 1986); *40 D 6262 Realty Corp. v. United Arab Emirates Gov't*, 447 F. Supp. 711 (S.D.N.Y. 1978).

Section 1608(a)(3) explicitly provides that service on a foreign sovereign must be "*addressed* and dispatched by the clerk of the court *to* the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3) (emphasis added). Cases involving mailings not so addressed are not controlling. We adhere to our conclusion that the plain language of

§ 1608(a)(3) does not foreclose the plaintiffs' method of service.

II. *The Vienna Convention*

Sudan and the United States contend that the Panel Opinion places the United States in violation of the Vienna Convention. They contend that the Panel Opinion will complicate international relations by subjecting the United States (and other countries) to service of process via any of its diplomatic missions throughout the world, despite its long-standing policy to refuse such service. As a preliminary matter, we note that these arguments were not properly raised in Sudan's initial briefs. Nonetheless, we exercise our discretion to consider the arguments, and we reject them.

The FSIA is the sole basis for obtaining jurisdiction over a foreign state in the courts of the United States. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). As noted above, the "legislative history of the FSIA demonstrates unequivocally that the Act was not intended to affect the immunity of 'diplomatic or consular representatives,'" that was established under the Vienna Convention and customary international law. *Tachiona*, 386 F.3d at 222-23 (quoting H.R. Rep. 94–1487, at 21). "Under the terms of [the Vienna Convention], the United States, in its role as a receiving state of foreign missions, is obligated to protect and respect the premises of any foreign mission located within its sovereign territory." *Bennett v. Islamic Republic of Iran*, 604 F. Supp. 2d 152, 159 (D.D.C. 2009), *aff'd*, 618 F.3d 19 (D.C. Cir. 2010).

The Panel Opinion does not conflict with the Vienna Convention. The Vienna Convention provides that

"[t]he premises of the mission shall be inviolable," and that "[a] diplomatic agent shall . . . enjoy immunity from [the host state's] civil and administrative jurisdiction." Vienna Convention, arts. 22, 31; *see also* H.R. Rep. 94–1487, at 26 ("Service on an embassy by mail would be precluded under this bill."). We acknowledge that these provisions preclude service of process on an embassy or diplomat as an agent of a foreign government, as there would be a breach of diplomatic immunity if an envoy were subjected to compulsory process. *See Tachiona*, 386 F.3d at 222 (noting that "the inviolability principle precludes service of process on a diplomat as agent of a foreign government"); *40 D 6262 Realty Corp.*, 447 F. Supp. at 712 (holding that the FSIA's legislative history makes clear that service by mail on an embassy is precluded under the Act). Accordingly, service on an embassy or consular official would be improper. But that is not what happened here. Rather, process was served on the Minister of Foreign Affairs at the foreign mission and not on the foreign mission itself or the ambassador. The papers were specifically addressed to the Minister of Foreign Affairs via the embassy, and the embassy sent back a return receipt acknowledging receipt of the papers.

The United States explains that it "consistently rejects attempted service via direct delivery to a U.S. embassy abroad. When a foreign court or litigant purports to serve the United States through an embassy, the embassy sends a diplomatic note to the foreign government indicating that the United States does not consider itself to have been served properly." Amicus Br. of the United States at 6. Our holding does not affect this policy. We do not preclude the United States (or any other country) from enforcing a policy of refusing to accept service via its embassies. We have previously recognized that "[w]ere the United States to

adopt exceptions to the inviolability of foreign missions here, it would be stripped of its most powerful defense, that is, that international law precludes the nonconsensual entry of its missions abroad." *767 Third Ave. Assocs. v. Permanent Mission of Republic of Zaire to United Nations*, 988 F.2d 295, 300-01 (2d Cir. 1993). The United States may continue to instruct its embassies to follow this protocol, and so may any other country with a foreign diplomatic embassy. Nothing about our decision affects the ability of any state to refuse to accept service via its embassies.

Here, Sudan did not elect to follow any such policy. It did not reject the service papers, as it could have done easily, but accepted them. In these circumstances, where plaintiffs mailed the documents addressed to the Sudanese Minister of Foreign Affairs via the embassy, and the embassy explicitly acknowledged receipt of the documents, the requirements of the statute were met.

Significantly, the Vienna Convention provides that a mission may "consent" to entry onto its premises. Section 1 of Article 22 of the Convention provides that: "The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the *consent* of the head of the mission." Vienna Convention, art. 22 (emphasis added). Here, the Sudanese Embassy's acceptance of the service package surely constituted "consent." Instead of rejecting the service papers, Sudan accepted them and then, instead of returning them, it explicitly acknowledged receiving them. These actions, we conclude, constitute consent.

The Vienna Convention "recognized the independence and sovereignty of mission premises that existed under customary international law." *767 Third Ave.*

Assocs., 988 F.2d at 300. An important reason for the inviolability of the embassy premises is that the embassy is, to some degree, an extension of the sovereignty of the sending state. *See United States v. Gatlin*, 216 F.3d 207, 214 n.9 (2d Cir. 2000). To send officers into the embassy to serve papers would thus be akin to sending officers into the sovereign territory of the sending state itself. There is nothing offensive, however, about mailing a letter into the sovereign territory of a foreign state. Indeed, that is the very procedure that Sudan and the State Department urge is the preferred and required practice. We therefore find it difficult to understand how mailing a letter to the Foreign Minister of a country in care of that country's embassy in Washington – particularly given that the embassy remains free to refuse delivery if it so chooses – can be considered a grave insult to the "independence and sovereignty" of the embassy's premises.

Indeed, the embassy is extended somewhat *less* sovereignty than the actual territory of the sending state. *See McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588 (9th Cir. 1983) ("A United States embassy, however, remains the territory of the receiving state, and does not constitute territory of the United States."); *see also* Jordan J. Paust, *Non-Extraterritoriality of 'Special Territorial Jurisdiction' of the United States: Forgotten History and the Errors of Erdos*, 24 YALE J. INT'L L. 305, 312 (1999) ("[A] U.S. embassy in foreign state territory is not U.S. territory and is not within the territorial jurisdiction of the United States, any more than a foreign embassy within the United States is foreign territory or within the territorial jurisdiction of a foreign state."). While the precise degree to which the sovereignty of the embassy is less than a state's control over its own territory is subject to debate, it is

evident that an embassy is not *more* sovereign than the territory of the sending state itself.

It is with some reluctance that we diverge from the Executive Branch's interpretation of the Vienna Convention, and of the potential effect of the Convention on the interpretation of the FSIA. It is appropriate to give the government's interpretation of the Vienna Convention "great weight" – and we do – but the State Department's views are "not conclusive." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982). For the reasons stated above, we do not find those views persuasive.

III. *The Factual Argument*

In its reply in support of its petition for rehearing, Sudan argues that the evidence does not support a finding that the mailing was accepted by Sudan or delivered to the Sudanese Minister of Foreign Affairs. It argues that the signatures on the return receipt are illegible and it makes a factual argument that the package never reached the embassy.

Sudan's factual challenge to the service of process comes too late, for three independent reasons. First, Sudan raises the factual arguments for the first time on appeal. "[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 132 (2d Cir. 2008) (quoting *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006)).

Second, the factual challenge to service requires factfinding. "[F]actfinding is the basic responsibility of district courts, rather than appellate courts, and . . . the Court of Appeals should not . . . resolve[] in the first instance [a] factual dispute which ha[s] not

been considered by the District Court." *DeMarco v. United States*, 415 U.S. 449, 450 n.* (1974). The factual challenge should have been raised during the five years that the case was pending in the district courts.

Third, even on appeal, Sudan did not raise the factual challenge until its reply brief in support of its petition for rehearing. It did not raise the issue in its briefing of the main appeal or in its initial submission on this petition for rehearing. *See Knipe v. Skinner*, 999 F.2d 708, 711 (2d Cir. 1993) ("Arguments may not be made for the first time in a reply brief.").

Accordingly, the factual challenge is not properly before us.

IV. *The Requirement of an OFAC License*

The United States also seeks to clarify the Panel Opinion with respect to when a license from OFAC is required. In the Panel Opinion, we held that the District Court did not err in issuing turnover orders without first obtaining either an OFAC license or a Statement of Interest from the Department of Justice. *See Harrison*, 802 F.3d at 406-07. This holding was based on the United States' position in previous Statements of Interest that § 201(a) of the Terrorism Risk Insurance Act ("TRIA"), Pub. L. No. 107–297, 116 Stat. 2322, 2337 (codified at 28 U.S.C. § 1610 note), permits a 28 U.S.C. § 1605A judgment holder to attach assets that have been blocked pursuant to certain economic sanctions laws without obtaining an OFAC license. The Panel Opinion included language, however, that may have suggested that § 1610(g) of the FSIA might permit a person holding a judgment under § 1605A to attach blocked assets without an OFAC license.

Harrison, 802 F.3d at 407-08. This is not the case and thus we now clarify our ruling.

Section 1605 of the FSIA creates exceptions to the general blanket immunity of foreign states from the jurisdiction of U.S. courts, including the "terrorism exception," 28 U.S.C. § 1605A, which Congress added to the FSIA in 1996 to "give American Citizens an important economic and financial weapon against . . . outlaw states" that sponsor terrorism. H.R. Rep. No. 104–383, at 62 (1995). This exception allows courts to hear claims against foreign states designated by the State Department as "state sponsor[s] of terrorism." *See Calderon–Cardona v. Bank of N.Y. Mellon*, 770 F.3d 993, 996 (2d Cir. 2014).

The TRIA was enacted to aid victims of terrorism in satisfying judgments against foreign sponsors of terrorism. Section 201(a) of the TRIA, which governs post-judgment attachment in some terrorism cases, provides, in relevant part:

> *Notwithstanding any other provision of law* . . . , in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605A or 1605(a)(7) (as such section was in effect on January 27, 2008) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

been considered by the District Court." *DeMarco v. United States*, 415 U.S. 449, 450 n.* (1974). The factual challenge should have been raised during the five years that the case was pending in the district courts.

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IV. *The Requirement of an OFAC License*

The United States also seeks to clarify the Panel Opinion with respect to when a license from OFAC is required. In the Panel Opinion, we held that the District Court did not err in issuing turnover orders without first obtaining either an OFAC license or a Statement of Interest from the Department of Justice. *See Harrison*, 802 F.3d at 406-07. This holding was based on the United States' position in previous Statements of Interest that § 201(a) of the Terrorism Risk Insurance Act ("TRIA"), Pub. L. No. 107–297, 116 Stat. 2322, 2337 (codified at 28 U.S.C. § 1610 note), permits a 28 U.S.C. § 1605A judgment holder to attach assets that have been blocked pursuant to certain economic sanctions laws without obtaining an OFAC license. The Panel Opinion included language, however, that may have suggested that § 1610(g) of the FSIA might permit a person holding a judgment under § 1605A to attach blocked assets without an OFAC license.

Harrison, 802 F.3d at 407-08. This is not the case and thus we now clarify our ruling.

Section 1605 of the FSIA creates exceptions to the general blanket immunity of foreign states from the jurisdiction of U.S. courts, including the "terrorism exception," 28 U.S.C. § 1605A, which Congress added to the FSIA in 1996 to "give American Citizens an important economic and financial weapon against . . . outlaw states" that sponsor terrorism. H.R. Rep. No. 104–383, at 62 (1995). This exception allows courts to hear claims against foreign states designated by the State Department as "state sponsor[s] of terrorism." *See Calderon–Cardona v. Bank of N.Y. Mellon*, 770 F.3d 993, 996 (2d Cir. 2014).

The TRIA was enacted to aid victims of terrorism in satisfying judgments against foreign sponsors of terrorism. Section 201(a) of the TRIA, which governs post-judgment attachment in some terrorism cases, provides, in relevant part:

> *Notwithstanding any other provision of law* . . . , in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605A or 1605(a)(7) (as such section was in effect on January 27, 2008) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA § 201(a) (codified at 28 U.S.C. § 1610 note) (emphasis added).

Sudanese assets in the United States are subject to such a block, pursuant to sanctions that began with Executive Order 13067 in 1997 and are now administered by OFAC and codified at 31 C.F.R. Part 538. Ordinarily, unless a plaintiff obtains a license from OFAC, he is barred from attaching assets that are frozen under such sanctions regimes. The Panel Opinion held that, based on previous statements of interest made by the United States, blocked assets that are subject to the TRIA may be distributed without a license from OFAC. *Harrison*, 802 F.3d 408-09.

The Panel Opinion framed the issue, however, as "whether § 201(a) of the TRIA and *§ 1610(g) of the FSIA*, which authorize the execution of § 1605A judgments against state sponsors of terrorism, permit a § 1605A judgment holder to attach blocked Sudanese assets without a license from OFAC. *Id.* at 407-08.

The Panel Opinion should not have included the reference to § 1610(g) of the FSIA. Section 1610(g)(2) of the FSIA, while providing that certain property "shall not be immune from attachment," does not contain the TRIA's same broad "notwithstanding any other provision of law" language. Therefore, it does not override other applicable requirements, such as the requirement of an OFAC license before the funds may be transferred. To be clear, when the TRIA does not apply and the funds at issue are attachable by operation of the FSIA alone, an OFAC license is still required.

In this case, plaintiffs obtained a terrorism judgment from the D.C. District Court pursuant to § 1605A of the FSIA. The Southern District of New York then

issued three turnover orders. The first two orders specified that they were issued pursuant to 28 U.S.C. § 1610(g) but did not mention the TRIA. Only the third order specified that assets were "subject to turnover pursuant to § 201 of the Terrorism Risk Insurance Act of 2002." Joint App. at 76. While the district court did not explicitly discuss whether the funds at issue in the December 12 and 13, 2013 orders were subject to turnover pursuant to the TRIA, based on our review of the record, which includes the complaint and judgment in the D.C. District Court proceedings, and the turnover petition and orders in the proceedings below, we conclude that the funds were subject to turnover pursuant to the TRIA. Plaintiffs have "obtained a judgment against a terrorist party on a claim based upon an act of terrorism," the blocked assets are the assets of that terrorist party, and, accordingly, those assets "shall be subject to execution or attachment in aid of execution in order to satisfy [plaintiffs'] judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable." *See* TRIA § 201(a) (codified at 28 U.S.C. § 1610 note). Because the funds at issue in all three turnover orders were subject to turnover pursuant to the TRIA, plaintiffs were not required to obtain an OFAC license before seeking distribution.

CONCLUSION

For the foregoing reasons, the petition, to the extent it seeks panel rehearing, is DENIED.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed: 12/09/2016]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of December, two thousand sixteen.

Docket No: 14-121

RICK HARRISON, JOHN BUCKLEY, III, MARGARET LOPEZ, ANDY LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, MARTIN SONGER, JR., SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE, TRACEY SMITH, as personal representative of the Estate of Rubin Smith,

Plaintiffs-Appellees,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant,

ADVANCED CHEMICAL WORKS, AKA ADVANCED COMMERCIAL AND CHEMICAL WORKS COMPANY LIMITED, AKA ADVANCED TRAINING AND CHEMICAL WORKS COMPANY LIMITED, ACCOUNTS & ELECTRONICS EQUIPMENTS, AKA ACCOUNTS AND ELECTRONICS EQUIPMENTS, et al.,

Defendants,

NATIONAL BANK OF EGYPT, CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK,

Respondents.

ORDER

Appellants Republic of Sudan, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

[United States Second Circuit Court of Appeals Seal]

APPENDIX G

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

* * *

§ 1391. Venue generally

* * *

(f) CIVIL ACTIONS AGAINST A FOREIGN STATE.—A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

* * *

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

* * *

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) IN GENERAL.—

(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the

enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

* * *

(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

* * *

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

Vienna Convention on Diplomatic Relations

Article 22

1. The premise of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Civil Procedure

Rule 4. Summons

* * *

(j) Serving a Foreign, State, or Local Government.

(1) *Foreign State.* A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.

* * *

APPENDIX H

UNITED STATES DISTRICT
AND BANKRUPTCY COURTS
FOR THE DISTRICT OF COLUMBIA

[Filed: 11/05/10]

Civil Action No.: 10-01689HHK

RICK HARRISON, et al.,
Plaintiff(s)

vs.

REPUBLIC OF SUDAN
Defendant(s)

AFFIDAVIT REQUESTING FOREIGN MAILING

I, the undersigned, counsel of record for plaintiff(s), hereby request that the Clerk mail a copy of the summons and complaint (and notice of suit, where applicable) to (list name(s) and address(es) of defendants):

Republic of Sudan
Deng Alor Koul
Minister of Foreign Affairs
Embassy of the Republic of Sudan
2210 Massachusetts Avenue NW
Washington, DC 2008

by: (check one)

☒ registered mail, return receipt requested

☐ DHL

pursuant to the provisions of: (check one)

☐ FRCP 4(f)(2)(C)(ii)

☒ 28 U.S.C. § 1608(a)(3)

☐ 28 U.S.C. § 1608(b)(3)(B)

I certify that this method of service is authorized by the domestic law of (name of country): United States of America and that I obtained this information by contacting the Overseas Citizens Services, U.S. Department of State.

/s/ Nelson M. Jones III
(Signature)

Nelson M. Jones, III
D.C. Bar # 320266
440 Louisiana St., Suite 1575
Houston, Texas 77002
(Name and Address)

UNITED STATES DISTRICT
AND BANKRUPTCY COURTS
FOR THE DISTRICT OF COLUMBIA

[Filed 11/17/10]

Civil Action No.: 1:10-cv-01689-HHK

RICK HARRISON

Plaintiff(s)

vs.

REPUBLIC OF SUDAN

Defendant(s)

CERTIFICATE OF MAILING

I hereby certify under penalty of perjury, that on the day of 17th day of November, 2010, I mailed:

1. ☐ One copy of the summons and complaint by registered mail, return receipt requested, to the individual of the foreign state, pursuant to the provisions of FRCP 4(f)(2)(C)(ii).

2. ☒ One copy of the summons, complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by registered mail, return receipt request, to the head of the ministry of foreign affairs, pursuant to the provisions of 28 U.S.C. § 1608(a)(3).

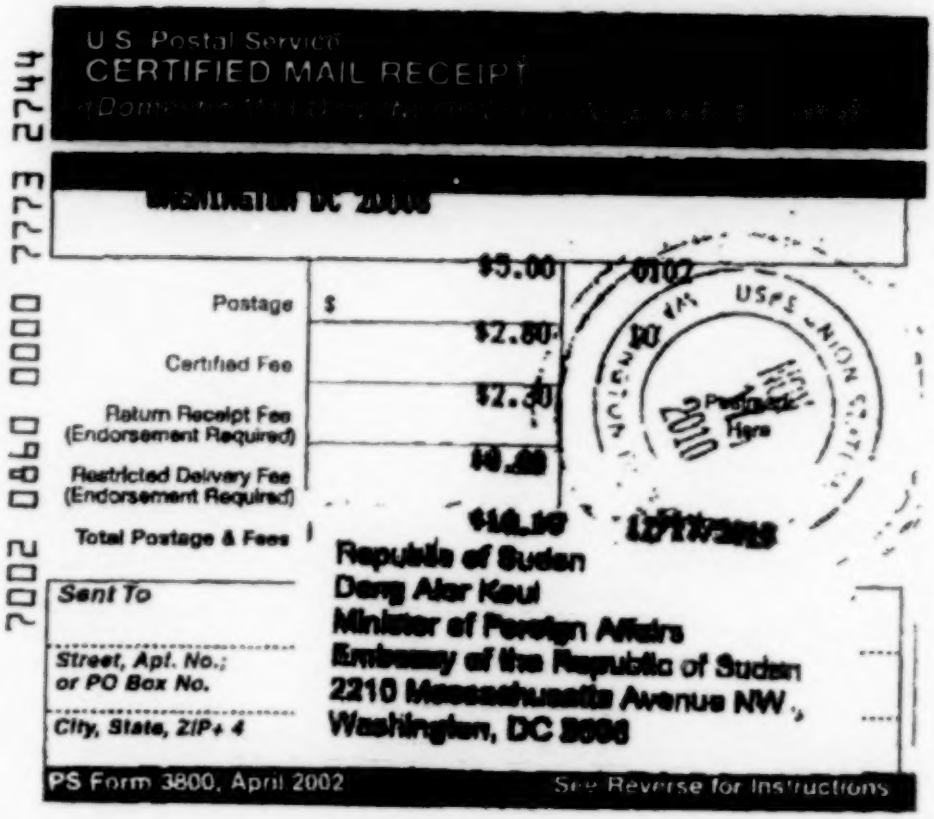
3. ☐ Two copies of the summons, complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by certified mail, return receipt requested, to

the U.S. Department of State, Office of Policy Review and Interagency Liaison, Overseas Citizens Services, 2100 Pennsylvania Avenue, NW, Fourth Floor, Washington, DC 20520, ATTN: Director of Overseas Citizens Services, pursuant to the provisions of 28 U.S.C. § 1608(a)(4).

4. ☐ One copy of the summons and complaint, together with a translation of each into the official language of the foreign state, by registered mail, return receipt requested, to the agency or instrumentality of the foreign state, pursuant to 28 U.S.C. § 1608(b)(3)(B).

ANGELA D. CAESAR, CLERK

By: Daniel J. Reidy
Deputy Clerk



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Bankruptcy Courts

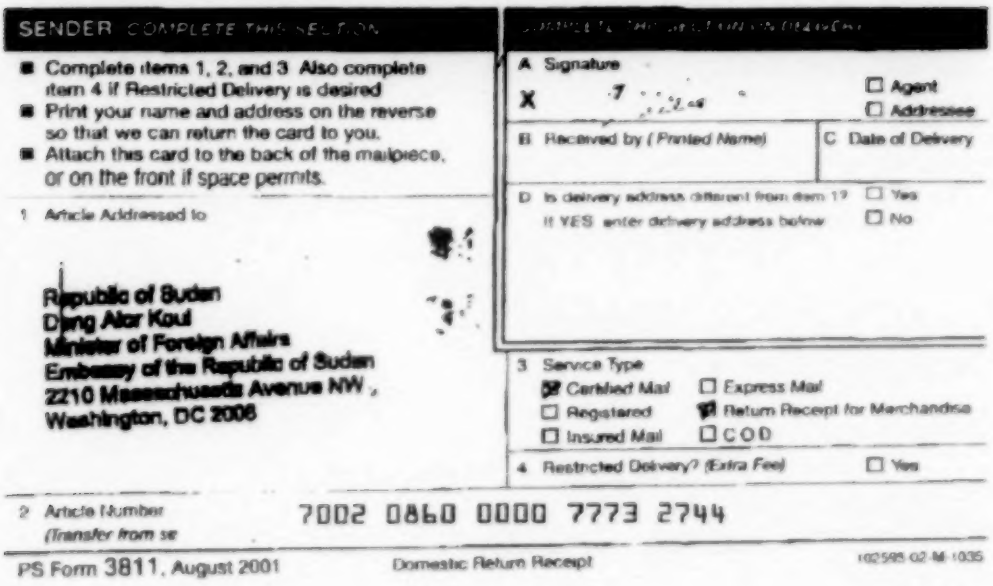
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Angela D. Caesar, Clerk of Court

US District Court, District of Columbia

10-CV-1689 (HHK)



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1 Article Addressed to:

Republic of Sudan
Dieng Alor Koul
Minister of Foreign Affairs
Embassy of the Republic of Sudan
2210 Massachusetts Avenue NW,
Washington, DC 2008

A Signature

X [illegible] ☐ Agent ☐ Addressee

B Received by (Printed Name) C Date of Delivery

D Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

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Expected Delivery Date: **November 18, 2010**
Class: **Priority Mail®**
Service(s): **Certified Mail™**
Return Receipt
Status: **Delivered**

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Your item was delivered at 3:02 pm on November 18, 2010 in CHARLOTTE HALL, MD 20622.

Detailed Results:

- **Delivered, November 18, 2010, 3:02 pm, CHARLOTTE HALL, MD 20622**
- **Notice Left, November 18, 2010, 1:10 pm, WASHINGTON, DC 20008**
- **Arrival at Unit, November 18, 2010, 8:38 am, WASHINGTON, DC 20009**
- **Acceptance, November 17, 2010, 2:14 pm, WASHINGTON, DC 20002**

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APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed 11/06/2015]

Docket No. 14-121

RICK HARRISON, JOHN BUCKLEY, III, MARGARET LOPEZ, ANDY LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE REPUBLIC OF SUDAN'S PETITION FOR PANEL REHEARING OR REHEARING EN BANC

BENJAMIN C. MIZER,
Principal Deputy Assistant Attorney General

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BENJAMIN H. TORRANCE, *Assistant United States Attorneys, Of Counsel.*

MORRIS, MARTIN SONGER, JR., SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE, TRACEY SMITH, as personal representative of the ESTATE OF RUBIN SMITH,

Plaintiffs-Appellees,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant,

ADVANCED CHEMICAL WORKS, aka ADVANCED COMMERCIAL AND CHEMICAL WORKS COMPANY LIMITED, aka ADVANCED TRAINING AND CHEMICAL WORKS COMPANY LIMITED, ACCOUNTS & ELECTRONICS EQUIPMENTS, aka ACCOUNTS AND ELECTRONICS EQUIPMENTS, *et al.*,

Defendants,

NATIONAL BANK OF EGYPT, CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK,

Respondents.

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Interest of the United States

The panel construed the Foreign Sovereign Immunities Act ("FSIA") to allow service on a foreign sovereign via its embassy in the United States if the papers are addressed to the foreign minister. That holding runs contrary to the FSIA's text and history, and is inconsistent with the United States' international treaty obligations and international practice. The United States has a substantial interest in ensuring that foreign states are served properly before they are required to appear in U.S. courts, and preserving the inviolability of diplomatic missions under the Vienna Convention on Diplomatic Relations ("VCDR"). Moreover, the government routinely objects to attempts by foreign courts and litigants to serve the U.S. government by direct delivery to an American embassy, and thus has a significant reciprocity interest in the treatment of U.S. missions abroad. The United States deeply sympathizes with the extraordinary injuries to the U.S. military personnel and their spouses who brought this suit, and condemns the terrorist acts that caused those injuries. Nevertheless, because of the government's interest in the proper application of rules regarding service of process on foreign states, as well as significant reciprocity concerns, the United States submits this brief as *amicus curiae* pursuant to Federal Rule of Appellate Procedure 29(a) in support of rehearing.

ARGUMENT

Point I—The Panel Incorrectly Permitted Service Through a Foreign State's Embassy

The panel incorrectly construed § 1608(a)(3) of the FSIA to permit service upon foreign states by allowing U.S. courts to enlist foreign diplomatic facilities in the

U.S. as agents for delivery to those sovereigns' foreign ministers. That method of service contradicts the FSIA's text and history, and is inconsistent with the United States' international obligations.

The FSIA sets out the exclusive procedures for service of a summons and complaint on a foreign state and provides that, if service cannot be made by other methods, the papers may be served "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3). The most natural understanding of that text is that the mail will be sent to the head of the ministry of foreign affairs at his or her regular place of work—*i.e.*, at the ministry of foreign affairs in the state's seat of government—not to some other location for forwarding. *See, e.g.*, *Barot v. Embassy of Republic of Zambia*, 785 F.3d 26, 30 (D.C. Cir. 2015) (directing service to be sent to foreign minister in state's capital city).[1]

The panel observed that § 1608(a)(3) does not expressly specify a place of delivery for service on a foreign minister, and assumed that mailing to the embassy "could reasonably be expected to result in delivery to the intended person." (Slip op. 13). But the FSIA's service provisions "can only be satisfied by strict compliance." *Magness v. Russian Fed'n*, 247 F.3d 609, 615 (5th Cir. 2001); *accord Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994). It is inconsistent with a rule of strict compliance

---

[1] Thus, a witness in congressional hearings described § 1608(a)(3) as requiring service by "mail to the foreign minister at the foreign state's seat of government." Hearings on H.R. 11315 Before Subcomm. on Admin. Law and Gov'tl Rels. of House Comm. on Judiciary (June 4, 1976) (testimony of M. Cohen).

to permit papers to be mailed to the foreign minister at a place other than the foreign ministry, even if the mailing is nominally addressed to that person, based on the assumption it will be forwarded.

The Court supported its conclusion by contrasting § 1608(a)(3)'s silence regarding the specific address for mailing with § 1608(a)(4)'s provision that papers be mailed to the U.S. Secretary of State "in Washington, [D.C.]," and inferring that Congress therefore did not intend to require mailing the foreign minister at any particular location. (Slip op. 12). But a separate contrast in the statute undermines that conclusion. For service on a foreign state agency or instrumentality, Congress expressly provided for service by delivery to an "officer, a managing or general agent, or to any other [authorized] agent." § 1608(b)(2). In contrast, for service on the foreign state itself, Congress omitted any reference to an officer or agent. *Id.* § 1608(a). That difference strongly suggests that Congress did not intend to allow service on a foreign state via delivery to any entity that could, by analogy, be considered the foreign state's officer or agent, including the state's embassy, even if only for purposes of forwarding papers to the foreign ministry.

The FSIA's legislative history makes clear that Congress did not intend for service to be made via direct delivery to an embassy, and spells out significant legal and policy concerns with such an approach. The panel acknowledged that the relevant House report explicitly stated that "'[s]ervice on an embassy by mail would be precluded under this bill.'" (Slip op. 15-16 (quoting H.R. Rep. No. 94-1487, at 26 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6625)). The panel was persuaded that this language did not reflect Congress's intent to preclude service by delivery to a foreign minister

"*via* or *care of* an embassy," as opposed to precluding service "on" the embassy if, for example, the suit is against the embassy. But suits against diplomatic missions are also suits against foreign states for purposes of the FSIA, *see Gray v. Permanent Mission of People's Republic of Congo*, 443 F. Supp. 816 (S.D.N.Y. 1978), *aff'd*, 580 F.2d 1044 (2d Cir. 1978), and there is no rationale for prohibiting service of papers at an embassy only in cases where the embassy is the named defendant.

Additional legislative history confirms that Congress was concerned about allowing foreign states to be served at their embassies. Early drafts of the FSIA provided for mailing papers to foreign ambassadors in the United States as the primary means of service on a foreign state. *See* S. 566, 93rd Cong. (1973); H.R. 3493, 93rd Cong. (1973). But, at the urging of the State Department, Congress removed any reference to ambassadors from the final service provisions, to "minimize potential irritants to relations with foreign states," particularly in light of concerns about the inviolability of embassy premises under the VCDR. H.R. Rep. No. 94-1487, at 11, 26.

Indeed, the panel's decision is contrary to the principle of mission inviolability and the United States' treaty obligations. The VCDR provides that "the premises of the mission shall be inviolable." 23 U.S.T. 3227, 500 U.N.T.S. 95, art. 22. As this Court has correctly concluded in an analogous context, this principle must be construed broadly, and is violated by service of process—whether on the inviolable diplomat or mission for itself or "as agent of a foreign government." *Tachiona v. United States*, 386 F.3d 205, 222, 224 (2d Cir. 2004); *accord Autotech Tech. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 748 (7th Cir.

to permit papers to be mailed to the foreign minister at a place other than the foreign ministry, even if the mailing is nominally addressed to that person, based on the assumption it will be forwarded.

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2007) ("service *through* an embassy is expressly banned" by VCDR and "not authorized" by FSIA (emphasis added)); *see 767 Third Ave. Assocs. v. Permanent Mission of Zaire*, 988 F.2d 295, 301 (2d Cir. 1993) (approvingly noting commentator's view that "process servers may not even serve papers without entering at the door of a mission because that would 'constitute an infringement of the respect due to the mission'"); Brownlie, *Principles of Public Int'l Law* 403 (8th ed. 2008) ("writs may not be served, even by post, within the premises of a mission but only through the local Ministry for Foreign Affairs."). The intrusion on a foreign embassy is present whether it is the ultimate recipient or merely the conduit of a summons and complaint.

The panel's contrary conclusion also improperly allows U.S. courts to treat the foreign embassy as a forwarding agent, diverting its resources to determine the significance of the transmission from the U.S. court, and to assess whether or how to respond. The panel assumed that the papers would be forwarded on to the foreign minister via diplomatic pouch, which is provided with certain protections under the VCDR to ensure the safe delivery of "diplomatic documents and articles intended for official use." VCDR, art 27. But one sovereign cannot dictate the internal procedures of the embassy of another sovereign, and a foreign government may well object to a U.S. court instructing it to use its pouch to deliver items to its officials on behalf of a third party.

Finally, the United States has strong reciprocity interests at stake. The United States has long maintained that it may only be served through diplomatic channels or in accordance with an applicable international convention or other agreed-upon method. Thus,

the United States consistently rejects attempted service via direct delivery to a U.S. embassy abroad. When a foreign court or litigant purports to serve the United States through an embassy, the embassy sends a diplomatic note to the foreign government indicating that the United States does not consider itself to have been served properly and thus will not appear in the case or honor any judgment that may be entered. That position is consistent with international practice. *See* U.N. Convention on Jurisdictional Immunities of States and Their Property, UN Doc. A/59/508 (2004), art. 22 (requiring service through international convention, diplomatic channels, or agreed-upon method); European Convention on State Immunity, 1495 U.N.T.S. 181 (1972), art. 16 (service exclusively through diplomatic channels); U.K. State Immunity Act, 1978 c.33 (same). If the FSIA were interpreted to permit U.S. courts to serve papers through an embassy, it could make the United States vulnerable to similar treatment in foreign courts, contrary to the government's consistently asserted view of the law. *See, e.g.*, *Medellín v. Texas*, 552 U.S. 491, 524 (2008) (U.S. interests including "ensuring the reciprocal observance of the Vienna Convention [on Consular Relations]" are "plainly compelling"); *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1295 (11th Cir. 1995) (FSIA's purposes include "according foreign sovereigns treatment in U.S. courts that is similar to the treatment the United States would prefer to receive in foreign courts").

Point II—The FSIA Does Not Override the Requirement of an OFAC License

Although Sudan's petition for rehearing does not rely on this issue, the panel also erred in suggesting

plaintiffs need not obtain an OFAC license before executing upon blocked assets under the FSIA.

As the panel noted (slip op. 22-23), the United States has repeatedly taken the position that section 201(a) of the Terrorism Risk Insurance Act ("TRIA") permits a person holding a judgment under 28 U.S.C. § 1605A to attach assets that have been blocked pursuant to certain economic sanctions laws, without obtaining an OFAC license. That position rests on the terms of TRIA, which permits attachment of blocked assets in specified circumstances "[n]otwithstanding any other provision of law." TRIA § 201(a).

But the panel erroneously applied the same construction to § 1610(g) of the FSIA. (Slip op. 22 (addressing "whether § 201(a) of the TRIA *and § 1610(g) of the FSIA*" permit § 1605A judgment holder to attach blocked assets without OFAC license) (emphasis added), 25 (turnover proper because execution sought "pursuant to the TRIA and 28 U.S.C. § 1610(g)")). As the United States has previously stated, where "funds at issue fall outside TRIA but somehow are attachable by operation of the FSIA alone . . . an OFAC license would be required before the funds could be transferred to plaintiffs." Statement of Interest of United States, *Wyatt v. Syrian Arab Republic*, No. 08 Civ. 502 (D.D.C. Jan. 23, 2015), at 18. While § 1610(g)(2) provides that certain property of a foreign state "shall not be immune from attachment," that language, consistent with the paragraph's title ("United States sovereign immunity inapplicable"), merely removes a defense of sovereign immunity. Section 1610(g) lacks TRIA's broad "notwithstanding any other provision" language, and does not override other applicable rules such as the need for an OFAC license. *See* 31 C.F.R. §§ 538.201(a), 538.313.

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No. 16-2267

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Filed 02/07/2017]

AVINESH KUMAR, et al.,
Plaintiffs-Appellees,

v.

REPUBLIC OF SUDAN,
Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF REVERSAL

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INTEREST OF THE UNITED STATES

The district court construed the Foreign Sovereign Immunities Act (FSIA) to allow private parties to serve a foreign state by having process sent by mail to its embassy in the United States, if the papers are addressed to the foreign minister. That holding runs contrary to the FSIA's text, which must be understood in light of the United States' obligations under the Vienna Convention on Diplomatic Relations, as well as the statute's legislative history, which makes clear that Congress enacted the FSIA's service provision to avoid conflict with those treaty obligations. The United States has a substantial interest in preserving the inviolability of diplomatic missions pursuant to its international treaty obligations. Moreover, the government has an important interest in ensuring that foreign states are properly served before they are required to appear in U.S. courts. The United States routinely objects to attempts by foreign litigants to serve the United States through delivery of process to a United States embassy outside of diplomatic channels, and thus the government has a significant reciprocity interest in the treatment of United States missions abroad.

The United States deeply sympathizes with the extraordinary injuries suffered by the family members of the sailors killed in the bombing of the U.S.S. Cole. And the United States condemns in the strongest possible terms the terrorist acts that caused the sailors' deaths. Nevertheless, because of the government's interest in the proper application of rules regarding service of process on foreign states, the United States submits this brief as amicus curiae in support of reversal.

BACKGROUND

1. This case arises from al Qaeda's terrorist bombing of the U.S.S. Cole in the Port of Aden in Yemen on October 12, 2000. J.A. 440. The bombing killed seventeen sailors and injured forty-two others. J.A. 441. In 2010, family members of the seventeen sailors killed in the bombing brought suit against the Republic of Sudan under 28 U.S.C. § 1605A, the terrorism exception to foreign sovereign immunity, alleging that Sudan provided material support to the al Qaeda operatives who carried out the Cole bombing. *Id.*

Although the current suit began in 2010, the litigation has a much longer, complicated procedural history. In brief, certain plaintiffs initially brought suit in 2004. J.A. 441. Sudan failed to defend and the court entered a default judgment. J.A. 442. Sudan subsequently appeared, and the court granted Sudan's motion to vacate the default judgment. *Id.* After the district court denied Sudan's motion to dismiss the suit and this Court affirmed, Sudan withdrew from the suit and, in 2007, the district court again entered a default judgment. J.A. 442-43. The district court awarded economic but not punitive damages, and the plaintiffs appealed. J.A. 443.

While the case was on appeal, in 2008, Congress amended the terrorism exception of the FSIA to, among other things, create a federal cause of action and to provide for punitive damages. J.A. 443. In 2010, plaintiffs brought a new suit under the amended terrorism exception. J.A. 444-45. Sudan continued to refuse to participate in the litigation. J.A. 445. After a bench trial in 2014, the district court found that Sudan's provision of material support to al Qaeda led to the killing of the seventeen sailors, and, in March 2015, it entered a default judgments against Sudan and

awarded damages, including punitive damages, to the plaintiffs. *Id.*

2. In April 2015, Sudan entered an appearance in the case and filed a motion to vacate the default judgments under Federal Rules of Civil Procedure 55(c) (authorizing a court to set aside a nonfinal default for good cause) or 60(b) (authorizing a court to set aside a final judgment under specified circumstances). The district court denied the motion. J.A. 446-47.

As relevant to the issue addressed in this brief, Sudan argued that the judgments were void under Rule 60(b)(4) because the district court lacked personal jurisdiction. J.A. 467; see *Wendt v. Leonard*, 431 F.3d 410, 412 (4th Cir. 2005) ("An order is 'void' for purposes of Rule 60(b)(4) only if the court rendering the decision lacked personal or subject matter jurisdiction or acted in a manner inconsistent with due process of law."). It is undisputed that the plaintiffs purported to serve Sudan by having process mailed to Sudan's embassy in Washington, D.C., addressed to the Sudanese foreign minister. J.A. 467. The plaintiffs relied on a provision of the FSIA that authorizes service:

> by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.

28 U.S.C. § 1608(a)(3); see J.A. 467.

Sudan argued that Section 1608(a)(3) does not permit service on a foreign state through its embassy.

J.A. 467. In support of that argument, Sudan argued that service on a foreign state at one of its foreign missions is prohibited by Article 22 of the Vienna Convention on Diplomatic Relations (VCDR), *done* April 18, 1961, 23 U.S.T. 3227, 3237, 500 U.N.T.S. 95, 104, which provides that "the premises of the mission shall be inviolable." See J.A. 469. Sudan further relied on the United States' amicus curiae brief filed in support of Sudan's petition for rehearing in *Harrison v. Republic of Sudan*, 838 F.3d 86 (2d Cir. 2016) (No. 15-121), in which the government argued that a private party's service by mail on a foreign mission is inconsistent with the FSIA's text and history, conflicts with the United States' treaty obligations relating to the inviolability of missions, and compromises the United States' ability to reject such service on its embassies. J.A. 469.

The district court held, however, that Section 1608(a)(3) permits a litigant to serve a foreign state by having process mailed to a state's foreign mission because "the statute does not prescribe the place of service, only the person to whom process must be served." J.A. 468 (quotation marks omitted). Relying on the Second Circuit's opinion denying panel rehearing in *Harrison*, the district court held that mission inviolability was not compromised because service was on the foreign minister, not the foreign mission, and because Sudan consented to service through its mission by accepting the package. J.A. 469. For these reasons, the district court held that the plaintiffs validly served Sudan, and it rejected Sudan's argument that the judgments were void because the court lacked personal jurisdiction. *Id.*

ARGUMENT

THE FOREIGN SOVEREIGN IMMUNITIES ACT DOES NOT PERMIT A LITIGANT TO SERVE A FOREIGN STATE BY HAVING PROCESS ADDRESSED TO THE FOREIGN MINISTER MAILED TO THE STATE'S EMBASSY IN THE UNITED STATES

1. The FSIA provides the sole basis for civil suits against foreign states and their agencies or instrumentalities in United States courts. The FSIA establishes the rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided" by the statute. 28 U.S.C. § 1604. If a suit comes within a statutory exception to foreign sovereign immunity, the FSIA provides for subject matter jurisdiction in the district courts. 28 U.S.C. § 1330(a). The statute provides for personal jurisdiction over the foreign state in such suits "where service has been made under section 1608." 28 U.S.C. § 1330(b).

Section 1608 provides the exclusive means for serving a foreign state in civil litigation. See Fed. R. Civ. P. 4(j)(1) ("A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608."). Section 1608(a) provides for service on "a foreign state or political subdivision of a foreign state." Section 1608(b) provides for service on "an agency or instrumentality of a foreign state." Both subsections specify hierarchical methods of service. First, service must be effected on a foreign state or its agency in accordance with any "special arrangement for service" between the plaintiff and the foreign state or agency. 28 U.S.C. § 1608(a)(1), (b)(1). If no such special arrangement exists, then service must be

provided "in accordance with an applicable international convention on service of judicial documents" or, in the case of an agency or instrumentality, on any agent authorized to receive service on behalf of the agency in the United States. *Id.* § 1608(a)(2), (b)(2).

If service cannot be made by one of those methods, then Section 1608 provides for service by delivery. The delivery provisions applicable to foreign states and to their agencies or instrumentalities differ in an important respect, however. While Section 1608(b)(3) authorizes service on a foreign state agency by delivery "if reasonably calculated to give actual notice," section 1608(a)(3) says nothing about actual notice. Instead, it authorizes service "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3). In light of the differences between the text of the two delivery provisions, courts have concluded that a private party may serve a foreign state by delivery only through "strict compliance" with the terms of Section 1608(a). *Magness v. Russian Federation*, 247 F.3d 609, 615 (5th Cir. 2001); see also *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994); but see *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1129 (9th Cir. 2010) (upholding defective service on foreign state because of substantial compliance with Section 1608(a)(3)).[1]

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[1] By contrast, some courts have upheld service on agencies or instrumentalities of a foreign state based on "substantial compliance" with Section 1608(b)(3) combined with actual notice to the defendant. See *Straub v. A P Green, Inc.*, 38 F.3d 448, 453 (9th Cir. 1994); *Sherer v. Construcciones Aeronauticas, S.A.*, 987 F.2d

Finally, Section 1608(a) provides for a fourth method of service on a foreign state, if service cannot be made under the delivery provision within thirty days. In that case, a plaintiff may deliver process to the State Department for service on the foreign state through diplomatic channels. 28 U.S.C. § 1608(a)(4).

2. Section 1608(a)(3) does not permit a private party to serve a foreign state by having process mailed to the embassy of the foreign state in the United States, addressed to the minister of foreign affairs. See U.S. Department of State, Bureau of Consular Affairs, Foreign Sovereign Immunities Act, http://go.usa.gov/x9FGq ("Service on a foreign embassy in the United States or mission to the United Nations is not one of the methods of service provided in the FSIA.").

As noted, Section 1608(a)(3) authorizes service "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." Although the provision does not expressly identify the place of service, the most natural understanding of the provision is that it requires that service be delivered to "the ministry of foreign affairs of the foreign state" and addressed to the specified government official, the head of the ministry. Thus, naturally read, the provision requires delivery to the official's principal place of business, the ministry of foreign affairs in the foreign state's seat of government. A state's foreign minister does not work in the state's embassies. Had Congress contemplated delivery to embassies, it would have enacted a statute

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1246 (6th Cir. 1993); *Harris Corp. v. National Iranian Radio & Television*, 691 F.2d 1344 (11th Cir. 1982).

requiring service to be addressed to the foreign state's ambassador.

In construing Section 1608(a)(3), the D.C. Circuit has explained that the provision "mandates service on the Ministry of Foreign Affairs, the department most likely to understand American procedure." *Transaero*, 30 F.3d at 154; see also *Barot v. Embassy of Republic of Zambia*, 785 F.3d 26, 30 (D.C. Cir. 2015) (directing service to be sent "to the 'head of the ministry of foreign affairs' in Lusaka, Zambia, whether identified by name or title, and not to any other official or agency") (citing 28 U.S.C. § 1608(a)(3)). The D.C. Circuit's interpretation is particularly instructive because most suits against foreign states (as opposed to suits against foreign state agencies or instrumentalities) are brought in that circuit. See *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 332 (D.C. Cir. 2003) (describing the District of Columbia as "the dedicated venue for actions against foreign states") (quoting amicus brief); 28 U.S.C. § 1391(f)(4) (providing for venue in suits against a foreign state or political subdivision thereof in the United States District Court for the District of Columbia).

Construing Section 1608(a)(3) to require service on the foreign minister by delivery to the state's foreign ministry is consistent with the courts' recognition that Congress required strict compliance with the service-by-delivery provision applicable to foreign states. See *Magness*, 247 F.3d at 615; *Transaero*, 30 F.3d at 154. While Congress permitted delivery on foreign state agencies or instrumentalities so long as the delivery is "reasonably calculated to give actual notice," 28 U.S.C. § 1608(b)(3), the provision governing service-by-delivery on a foreign state makes no mention of actual notice, *id.* § 1608(a)(3). A state's foreign

minister's principal place of business is in the seat of government, not in the state's foreign embassies. Thus, a private party's service by mail or in person on a foreign minister at one of the state's embassies necessarily would require the further transmission of the summons and complaint to the foreign minister by the embassy staff. While the district court may have viewed that means of service as reasonably calculated to give actual notice to the foreign minister, that is insufficient for service by delivery under Section 1608(a)(3).

As we next show, the United States' treaty obligations and the FSIA's legislative history, which explains the statute's consistency with those treaty obligations, further support the understanding that Section 1608(a)(3) does not permit a private party to serve a foreign state by having process mailed to one of its embassies. Such service of process on a foreign mission would be inconsistent with the United States' treaty obligations. But because Section 1608(a)(3) may be interpreted to prohibit such service, it must be so construed. See Restatement (Third) of the Foreign Relations Law of the United States § 114 (Am. Law Inst. 1986) ("Where fairly possible, a United States statute is to be construed so as not to conflict with * * * an international agreement of the United States.") (Third Restatement); see also, *e.g.*, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

Article 22, Section 1 of the VCDR provides that "the premises of the mission shall be inviolable." VCDR, *done* April 18, 1961, 23 U.S.T. 3227, 3237, 500 U.N.T.S. 95, 104. There is an international consensus

that a litigant's service of process through mail or personal delivery to a foreign mission is inconsistent with the inviolability of the mission enshrined in VCDR Article 22. The United Nations International Law Commission prepared the preliminary draft of the Vienna Convention and presented the draft to the United Nations member states for their consideration. Int'l L. Comm'n, Report of the Commission to the General Assembly, U.N. GAOR, 12th Sess., Supp. 9, U.N. Doc. A/3623 (1957), *reprinted in* [1957] 2 Y.B. Int'l L. Comm'n 131, 131, U.N. Doc. A/CN.4/SER.A/1957/Add.1, https://goo.gl/26RrG3 (Commission Report). In describing the almost identical provision that became Article 22, the International Law Commission explained that:

> [a] special application of this principle [of the inviolability of the premises of the mission] is that no writ shall be served within the premises of the mission, nor shall any summons to appear before a court be served in the premises by a process server. Even if process servers do not enter the premises but carry out their duty at the door, such an act would constitute an infringement of the respect due to the mission. All judicial notices of this nature must be delivered through the Ministry for Foreign Affairs of the receiving State.

Commission Report, [1957] 2 Y.B. Int'l L. Comm'n at 137.

The states that became parties to the VCDR have so understood Article 22, as is documented in numerous treatises describing state practice under the treaty. See, *e.g.*, Eileen Denza, *Diplomatic Law* 124 (4th ed. 2016) ("The view that service by post on mission premises is prohibited seems to have become generally

accepted in practice."); James Crawford, *Brownlie's Principles of Public International Law* 403 (8th ed. 2012) ("It follows from Article 22 that writs cannot be served, even by post, within the premises of a mission but only through the local Ministry for Foreign Affairs."); Ludwik Dembinski, *The Modern Law of Diplomacy* 193 (1988) ("[Article 22] implicitly also protects the mission from receiving by messenger or by mail any notification from the judicial or other authorities of the receiving State."). And, reflecting the international consensus, other nations' state immunity statutes do not authorize a litigant's service on a foreign state through mail or personal delivery to a foreign state's embassy, in the absence of express consent by the foreign state. See, *e.g.*, Act on the Civil Jurisdiction of Japan with respect to a Foreign State, Act No. 24 of 2009, art. 20 (Japan); Foreign States Immunity Law, 5769-2008, § 13 (Israel); *Foreign State Immunities Act 1985*, §§ 24, 25 (Austl.); State Immunity Act, R.S.C. 1985, c S-18, § 9 (Can.); Foreign States Immunities Act 87 of 1981, § 13 (S. Afr.); State Immunity Act 1978, c. 33, § 12 (U.K.).

Moreover, the Executive Branch has long and consistently construed Article 22, and the customary international law it codifies, as precluding a litigant from serving process by mail or personal delivery to a foreign embassy as a means of serving a foreign state. See *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 982 (D.C. Cir. 1965) (Washington, J., concurring) ("The establishment by one country of a diplomatic mission in the territory of another does not implicitly or explicitly empower that mission to act as agent of the sending state for the purpose of accepting service of process." (quoting Letter from Leonard C. Meeker, Acting Legal Adviser, to John W. Douglas, Assistant Attorney General, August 10, 1964)). The courts owe

deference to that interpretation. See *Abbott v. Abbott*, 560 U.S. 1, 15 (2010) ("It is well settled that the Executive Branch's interpretation of a treaty is entitled to great weight." (quotation marks omitted)).

In light of that longstanding understanding of the Vienna Convention, the United States routinely refuses to recognize the propriety of a private party's service through mail or personal delivery to a United States embassy. When a foreign litigant (or foreign court official on behalf of a foreign litigant) purports to serve the United States through its embassy, the embassy sends a diplomatic note to the foreign government explaining that the United States does not consider itself to have been served consistently with international law and thus will not appear in the litigation or honor any judgment that may be entered against it. For that reason, the United States has a strong interest in ensuring that its courts afford foreign states the same treatment the United States contends it is entitled to under the Vienna Convention. *Cf. Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984) (noting that, in construing the FSIA, courts should consider the United States' interest in reciprocal treatment abroad).

Reflecting the Executive Branch's understanding and international practice, United States courts have recognized that a private party's delivery of process to a foreign mission or ambassador in the United States for service on another is inconsistent with the concept of inviolability enshrined in the VCDR. Thus, the Seventh Circuit held invalid a private party's service on a foreign-state agency by delivery to the foreign state's embassy in the United States because "service through an embassy is expressly banned" by the VCDR. *Autotech Tech. LP v. Integral Research & Dev.*

Corp., 499 F.3d 737, 748 (2007). Similarly, the D.C. Circuit has held that a litigant's service of process on an ambassador "as an agent of his sending country" is inconsistent with the inviolability of diplomatic agents established by VCDR Article 29. *Hellenic Lines*, 345 F.2d at 980; see *id.* at 980 n.4.

In addition, the FSIA's legislative history expressly addresses and repudiates the idea that a litigant's service on a foreign state may be effected by delivery of process to its mission in the United States. The House Report's section-by-section analysis explains that, prior to the FSIA's enactment, some litigants attempted to serve foreign states by "mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state." H.R. Rep. No. 94-1487, at 26 (1976); see *id.* (describing such service as being of "questionable validity"). The report states that "Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the [VCDR], which entered into force in the United States on December 13, 1972. Service on an embassy by mail would be precluded under this bill." *Id.*

Because the VCDR prohibits a private party from serving a state by having process mailed to a foreign mission, because Section 1608(a)(3) may fairly be construed to prohibit such delivery, and because the FSIA's legislative history demonstrates Congress's intent to prevent private-party service on an embassy, the district court erred in concluding that plaintiffs had properly served the Republic of Sudan. *Charming Betsy*, 6 U.S. (2 Cranch) at 118; Third Restatement § 114.

3. Relying in part on the Second Circuit's decision in *Harrison v. Republic of Sudan*, the district court held that plaintiffs properly served Sudan because Section

1608(a)(3) "does not prescribe the place of service, only the person to whom process must be served." J.A. 468; see *id.* (citing 838 F.3d 86, 93 (2016)). But the Second Circuit's reasoning was that plaintiffs' service through "[a] mailing addressed to the minister of foreign affairs via Sudan's embassy in Washington, D.C." is permissible under the statute because it "could reasonably be expected to result in delivery to the intended person." *Harrison*, 838 F.3d at 90. That approach is legally erroneous. As we explained above, while Section 1608(b)(3) authorizes service on a foreign state *agency or instrumentality* by delivery "if reasonably calculated to give actual notice," section 1608(a)(3) does not permit service on a foreign state itself by delivery reasonably calculated to give notice.

In addition, in light of the United States' international treaty obligations and the FSIA's legislative history discussed above, Section 1608(a)(3) cannot plausibly be construed to permit a private party to serve a foreign state by delivering process to the foreign state's embassy. The Second Circuit believed that the House Report discussion of Section 1608 "fails to make the distinction at issue in the instant case, between '[s]ervice *on* an embassy by mail,' [H.R. Rep. No. 94-1487, at 26] (emphasis added), and service on a minister of foreign affairs *via* or *care of* an embassy." *Harrison*, 838 F.3d at 92. But the distinction between service "on" an embassy and service on a foreign minister "via" an embassy is a false one. In both cases, the suit is against the foreign state itself. See 28 U.S.C. § 1603(a); *El-Hadad v. United Arab Emirates*, 216 F.3d 29, 31-32 (D.C. Cir. 2000) (treating suit against foreign embassy as suit against foreign state for purposes of the FSIA). There is no statutory basis for prohibiting a plaintiff's service at an embassy when the plaintiff names a foreign state's embassy as the

defendant but not when the plaintiff instead names the foreign state.

Moreover, the Second Circuit plainly misconstrued the legislative history. The House Report unambiguously expressed disapproval for the method of "attempting to commence litigation against *a foreign state*" by "the mailing of a copy of the summons and complaint *to a diplomatic mission* of the foreign state." H.R. Rep. No. 94-1487, at 26 (emphasis added). Private parties' attempted service by mailing a summons and complaint to an embassy, however addressed, was the harm Congress sought to remedy in enacting Section 1608(a)(3).

That conclusion again is buttressed by the international obligation to respect mission inviolability. As discussed above, the House Report explains that Congress enacted Section 1608 to avoid inconsistency with VCDR Article 22(1), which provides categorically that "[t]he premises of the mission shall be inviolable," and which precludes a private party from making a foreign state a defendant in a suit through any type of service through mail or personal delivery to its embassy. The district court below and the Second Circuit in *Harrison* believed that service on a foreign minister sent to an embassy is not precluded by the inviolability of the mission because it is the foreign minister who is served, not the embassy. J.A. 469; 838 F.3d at 92. But that purported distinction reflects a misunderstanding of Article 22 and the concept of inviolability it embodies, as explained above. See also Eileen Denza, *Interaction Between State and Diplomatic Immunity*, 102 American Soc. of Int'l L. Proc. 111, 111 (2008) ("At the very outset of legal proceedings against a state there is the problem of service of process—proceedings against the defendant cannot be begun

through service on its embassy premises in the light of Article 22 of the Vienna Convention on Diplomatic Relations.").

The district court and the Second Circuit also believed that because an embassy employee had accepted the delivery of the service of process, the embassy had consented to receive service, even if service of process would otherwise be a violation of its inviolability. J.A. 469; 838 F.3d at 95 ("Here, the Sudanese Embassy's acceptance of the service package surely constituted 'consent.'"). Article 22(1) provides, however, that "[t]he premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent *of the head of the mission*." (emphasis added). There is no evidence in either this case or *Harrison* that the Ambassador consented to receive plaintiffs' service of process by mail delivery on behalf of the foreign minister or Sudan. Other embassy employees do not have authority under Article 22 to consent to an action that otherwise would be a breach of a foreign mission's inviolability.[2]

In short, the text of the FSIA, its legislative history, and the United States' international treaty obligations all support interpreting Section 1608(a)(3) as not permitting private parties to serve process on a foreign state through its embassy in the United States. Because plaintiffs in this case did not properly serve Sudan, the district court lacked personal jurisdiction.

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[2] When staff at United States embassies around the world sign for or accept delivery of packages, the United States does not consider that to amount to consent within the meaning of Article 22, nor as legally proper service of process upon the United States if such a package contains a summons and complaint not transmitted through diplomatic channels.

28 U.S.C. § 1330(b). Accordingly, the district court erred in denying Sudan's motion to vacate the judgments as void under Rule 60(b)(4). See *Wendt v. Leonard*, 431 F.3d 410, 412 (4th Cir. 2005).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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February 2017

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I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Goudy Old Style, a proportionally spaced font.

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s/ Lewis S. Yelin
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